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Comments on the Economic Case for Price Gouging Laws and Select Proposed Rules

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I. Introduction

Part One of the New York Attorney General’s staff report on price gouging economics and price volatility—titled “The Economic Case for Price Gouging Laws” (hereinafter, “Economic Case” or “staff report”)—sets out a positive argument for enforcing the state’s price gouging law.² While the Economic Case acknowledges that fairness concerns help motivate price gouging laws, it aims to ground its justification in economic reasoning rather than ethical claims. Accordingly, the staff report aims to identify the economic benefits that result from enforcing price gouging laws.

The staff report is a noteworthy contribution to the public policy debate over price gouging laws. First, it appears to be the first effort by a state agency to present an economic rationale for enforcing price gouging laws. Price gouging laws are, among other things, economic regulations, and so it is appropriate to analyze their costs and benefits. A report like this has the potential to inform enforcement strategy, guide compliance, and shape future legislative discussions. Second, the report distinguishes between New York’s approach—targeted to profiteering—and broader, blunter tools such as price controls. This distinction is important, as policy debates too often conflate profit-margin directed rules with simple price ceilings.³ Third, the report references a few price gouging enforcement actions. While these cases are not central to the analysis, their inclusion is a step beyond the often overly abstract tone of many price gouging debates. Finally, the staff paper touches on connections between price gouging enforcement, market power, and macroeconomic dynamics such as inflation—areas not often addressed in this context.⁴

The report itself notes that “many economists have pronounced themselves skeptical of price gouging legislation.”⁵ Against that backdrop, it attempts to lay out the economic concepts and

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² New York Office of the Attorney General. “The Economic Case for Price Gouging Laws.” Part one of *Price Gouging Economics and Price Volatility*, Staff Report, February 2025. URL: <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-econ-staff-report.pdf>.

³ Staff report at p. 10.

⁴ Staff report at 12-14.

⁵ Staff report at p. 17.

frameworks that might support a positive case for enforcement. Since the attorney general is charged with enforcing the law, a better understanding of the economics could improve regulatory design and help shape enforcement.

The staff report is not without its flaws, chief among them its one-sided treatment of the materials it surveys. Studies and commentaries supportive of price gouging laws are typically presented without qualification, while those critical of such laws receive significantly more scrutiny. For example, while the report cites a range of law review articles—some favorable, some skeptical—it flags only the skeptical ones as “law student or undergraduate student notes,” subtly casting doubt on their credibility.⁶ Likewise, it criticizes skeptical articles for relying on theory rather than evidence, even as it accepts theoretical claims from more sympathetic sources without similar scrutiny. On balance, the Economic Case reads less like a dispassionate economic analysis and more like a brief for the prosecution—one that naturally invites a response from the defense.

This comment responds to the staff report’s implicit invitation to take the economic rationale for price gouging enforcement seriously. What follows is a constructive assessment of the Economic Case: clarifying its assumptions, evaluating its use of theory and evidence, and identifying where its arguments fall short. Careful attention to the economic foundations of enforcement is essential for weighing the law’s potential benefits and harms. While the report rightly notes that the Attorney General is obligated to enforce the statute, the office retains wide discretion in how it selects cases and in what remedies it seeks. A more balanced and empirically grounded understanding of the relevant economics could help ensure that this discretion is used to serve the public interest.

The economic insights developed in this comment can help refine the enforcement standards proposed in the recent Notices of Proposed Rulemaking (NPRMs).⁷ To illustrate that point, I offer brief comments below on selected provisions from the NPRMs—specifically §§ 600.1, 600.5, 600.8, and 600.9. Each observation connects earlier economic analysis to a specific regulatory proposal, with the aim of clarifying trade-offs, improving targeting, or aligning enforcement with the economic analysis of price gouging law.

II. The Economic Case for Price Gouging Laws described

The Economic Case offers a justification for price gouging laws grounded in key market dynamics observed during emergencies. It begins from the premise that in crisis conditions, the supply of essential goods—such as fuel, food, or medical supplies—is typically highly inelastic: producers cannot increase availability in the short term, even when prices rise. As demand surges or

⁶ Staff report at p. 18, footnote 63.

⁷ See generally: New York Attorney General, *Rulemaking on laws governing price gouging in New York*, Last visited April 14, 2025. URL: <https://ag.ny.gov/rulemaking-laws-price-gouging>.

supply falls sharply, unrestrained price increases do little to bring in new supply but instead shift purchasing power from consumers to sellers.

Unlike conventional price ceilings, which impose rigid caps on prices, the staff report emphasizes that modern statutes—such as New York’s—focus more narrowly on unjustified increases in markup, allowing room for cost-based price adjustments during emergencies. This approach aims to target disproportionate profiteering while still permitting price increases that reflect real increases in supply or distribution costs. The goal is to preserve core market signals and incentives to supply. By contrast, extreme price hikes without cost justification are framed as unproductive profiteering—enriching sellers without addressing the underlying shortages.

The report argues that rapid and disproportionate price increases may encourage hoarding by consumers who expect prices to rise further—exacerbating shortages and destabilizing markets. It also contends that in sectors already marked by high market concentration, firms face weaker competitive and reputational checks and may raise prices more sharply during emergencies. In such cases, price gouging enforcement is presented as a tool to curb temporary market power and promote economic efficiency. On this view, modern enforcement targets failures in market discipline that emerge during crises—helping to deter exploitative pricing, reduce hoarding, and stabilize markets. The broader argument is that narrowly tailored enforcement can correct emergency-specific market failures and reduce economically wasteful responses.

The Economic Case highlights several conceptual arguments in favor of price gouging enforcement but gives limited attention to competing theoretical perspectives or to the existing body of empirical research. What follows examines both: first, by considering the theoretical foundations relevant to price gouging law, then by reviewing the empirical evidence on how such laws affect outcomes in practice.

III. Theoretical Foundations: Understanding Price Gouging Economics

Theoretical frameworks play a critical role in shaping how price gouging laws are designed and enforced. Economic and legal theories help policymakers identify the conditions under which anti-gouging measures might enhance consumer welfare—or create unintended harms. Accordingly, it is essential to examine the underlying assumptions of these frameworks, particularly those concerning supply responsiveness, consumer behavior, and strategic market dynamics, to assess whether enforcement is likely to produce the intended results.

This section begins by reviewing the conventional economic argument against price gouging regulations, then turns to the theoretical sources cited in the staff’s Economic Case, along with other relevant contributions. Although standard microeconomic theory is often associated with skepticism toward price regulation, it does offer qualified support for targeted price or profit margin limits during emergencies—provided certain conditions are met. Still, the mere

theoretical possibility of efficiency gains under specific assumptions does not justify implementing such policies. Sound implementation depends not only on understanding what theory suggests but also on recognizing its limitations and the practical difficulties of translating theory into effective regulation.⁸

A. The Conventional Economic Case Against Price Gouging Laws

The conventional economic case against price gouging laws emerges from standard welfare analysis based on supply and demand. The market-clearing price is the price at which quantity supplied equals quantity demanded. When depicted graphically, the point at which supply and demand curves cross identifies the unique market clearing price. Given standard assumptions used in defining supply and demand, any policy pushing prices higher or lower than the market clearing level will reduce the total economic surplus generated through the market.⁹

The standard welfare result does not depend on the specific elasticity of supply or demand. Elasticity of supply reflects how responsive quantity supplied is to changes in price, and the elasticity of demand similarly reflects how responsive quantity demanded is to changes in price. The staff report cites several economic analyses to demonstrate supply is frequently very inelastic in the short run. But even if supply was *perfectly* inelastic, under standard analysis it would remain the case that policies pushing prices below the market clearing level could not improve total economic welfare and likely would reduce it.

For clarity it is important to recognize supply and demand are properly defined with respect to an identified time frame and geographical range: the quantity of cotton demanded within New York over the course of a week, the quantity of umbrellas supplied in Albany over a year, the demand for snow shovels in Buffalo during the month of October, and so on. Typically, as the length of time employed grows longer, the elasticity of supply and demand grows larger. This shifting reflects the familiar pattern that with more time to adjust both producers and consumers can seek out more alternatives. For example, a consumer employing a pod-based coffee system may continue buying pods as prices rise, but should higher prices persist the consumer may shift to an alternative. A manufacturer seeing higher prices for its products may initially respond by adding overtime shifts for existing workers, but if higher prices are sustained it will expand its facilities and hire additional workers.

“A price is a signal wrapped up in an incentive,” in that it both reflects information about the relative scarcity of goods and provides suppliers and consumers reasons to act on that

⁸ See generally Mark Pennington. *Robust political economy*. Edward Elgar Publishing, 2010.

⁹ David Shapiro, David Macdonald, Steven Greenlaw et al., *Principles of Macroeconomics* 3.5 (3d ed., 2022), <https://openstax.org/books/principles-macroeconomics-3e/pages/3-5-demand-supply-and-efficiency>.

information.¹⁰ A price increase encourages consumers to seek out substitutes for the apparently now scarcer good and treat the existing stock of the goods more carefully. A price increase encourages suppliers to go to greater lengths to bring goods to the market and consider making long-term investments to maintain higher output at competitive prices. Price restrictions, in the conventional view, obscure the signal and dampen incentives to act. As a result, consumers adjust less and suppliers are less motivated to respond—contributing to persistent shortages and inefficient rationing.

Sustained price increases motivate suppliers to invest in additional production capacity, better logistics networks, or expanded inventories. Thus, regulations intended to keep prices low during emergencies may inadvertently reduce private incentives to prepare for future crises, weakening long-run resilience.

In practice, market-driven prices are stickier than the conventional explanation suggests.¹¹ Supplier prices do not adjust with every rise and fall in costs nor with each variation in demand, even though conventional explanations suggest it would be profitable to do so. Economists offer a variety of potential explanations from menu costs to reputational concerns to consumer search costs and so on.

For our purposes, the mere fact that suppliers do not voluntarily push prices up to the market-clearing level enormously complicates the welfare analysis of policies that seek to place prices below the market-clearing level. Rather than simply blaming any economic inefficiency on “bad” price restraints (or crediting policy for price stability), an economist would need to engage in an attribution analysis to separate market-based motivations for below market-clearing prices from policy-driven price suppression. It could be, for example, that during a short-term market disruption, most suppliers voluntarily restrain prices to levels below those required by price gouging laws.¹²

B. Demand-side Considerations

When prices rise, consumer incentives shift toward conservation, moderation, and reduced hoarding—since the opportunity cost of holding extra inventory becomes higher. Conversely, artificially suppressing prices maintains a lower opportunity cost of holding inventory,

¹⁰ The phrasing is from a popular instructional video series. Alex Tabarrok, “A Price Is a Signal Wrapped up in an Incentive,” Marginal Revolution University, n.d. URL: <https://mru.org/courses/principles-economics-microeconomics/price-system-spontaneous-order>.

¹¹ Staff report at p. 13, citing Eric T. Anderson and Duncan I. Simester, Price Stickiness and Customer Antagonism, 125 *Quarterly Journal of Economics* 729, 763 (2010).

¹² As the staff report emphasizes, at least in New York the state permits passthrough of higher costs during abnormal market disruptions. Retailers concerned about their reputations among consumers must weigh not only legal standards but also how price increases may be perceived as unfair—even when those increases are justified by higher costs. See generally, Maxwell, Sarah. *The Price is Wrong: Understanding What Makes a Price Seem Fair and the True Cost of Unfair Pricing*. John Wiley & Sons (2007).

potentially encouraging hoarding or stockpiling. The staff report cites empirical evidence suggesting that rapidly rising prices can themselves trigger increased hoarding—the evidence will be considered below—but such behavior does not contradict the conventional view of the relationship between prices and hoarding, just simply requires a more complete account of the components of demand. A demand curve is defined as the relation between quantity demanded and the range of possible prices for the good or service itself, holding constant other factors that would affect that relationship. Those other factors include expectations of future prices.¹³ Should an increase in current prices be accompanied by an increase in expected future prices, the quantity demanded can be higher at the current price than it was under the prior lower price. While an increase in price being accompanied by an increase in quantity demanded may seem surprising to a new student of economics, there is nothing extraordinary in the influence of changing expected prices on current purchasing decisions.

Standard economic theory warns that price constraints, though intended to assist low-income or vulnerable consumers, may backfire by generating hidden costs and unintended consequences. Artificially low prices increase consumer search costs and can lead to misallocation, queues, black markets, or favoritism in allocating limited goods. These non-price rationing methods can disproportionately harm precisely those low-income consumers the policy aims to protect, as they may face higher costs of searching or waiting. A suburban shopper with an oversized SUV can easily check several stores. By contrast, a low-income urban shopper relying on public transit may face significant costs just to reach a second store.¹⁴

C. Microeconomics of Welfare-Enhancing Price Constraints

The Economic Case explicitly relies upon theoretical arguments at several points. For example, the staff report references an article suggesting anti-gouging laws can enhance market efficiency by counteracting behavioral biases.¹⁵ Another paper cited favorably explains price gouging laws may induce beneficial overconsumption of goods, such as vaccine uptake, when consumers act strategically before law-induced shortages emerge.¹⁶ A third theoretical discussion is employed to suggest costs of queuing have fallen, improving the economic viability of non-price allocation

¹³ David Shapiro, David Macdonald, Steven Greenlaw et al., *Principles of Macroeconomics* 3.2 (3d ed., 2022), <https://openstax.org/books/principles-macroeconomics-3e/pages/4-3-the-market-system-as-an-efficient-mechanism-for-information>.

¹⁴ Consider the implications of Naohito Abe, Chiaki Moriguchi, and Noriko Inakura. *The effects of natural disasters on prices and purchasing behaviors: the case of the great East Japan earthquake*. Institute of Economic Research, Hitotsubashi University, 2014.

¹⁵ Geoffrey C. Rapp, “Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation,” 94 *Kentucky Law Review* 535, at p. 558 (2006). In the first half of his article Prof. Rapp argues for allowing price gouging except in areas where electronic payment systems have collapsed. The staff report does not discuss this argument.

¹⁶ Robert K. Fleck, “Can Prohibitions on “Price Gouging” Reduce Deadweight Losses?” 37 *International Review of Law and Economics*. 100 (2014).

systems.¹⁷ And, of course, the staff paper cites textbook discussions of supply and demand to frame the explanation of how higher prices when supply is inelastic can result in substantial shifts of economic surplus from consumers to suppliers.¹⁸

And despite the straightforward argument against restrictions on prices that emerges from basic supply and demand analysis, microeconomics-based arguments may offer an affirmative basis for targeted price gouging enforcement. For example, several economists have compared price and non-price allocation mechanisms for cases in which willingness-to-pay diverges substantially from need. Weitzman (1977), using a formal economics model, shows that while price systems work better when people's needs vary widely and income distribution is relatively equal, an equal rationing system performs better when needs are uniform but income inequality is high.¹⁹ Che, Gale, and Kim (2013) note that when some consumers are severely income-constrained non-market allocation schemes may outperform competitive market allocation on strict utilitarian grounds.²⁰

Kominers and Dworzak (2025) develop a model similar in spirit to the Weitzman article to present a theory of beneficial price gouging constraints, but with a more general model not relying on an assumption of fixed supply.²¹ Central to their analysis is that price reductions redistribute surplus from sellers to buyers, which improves welfare when buyers have significantly higher marginal utility of money than sellers—a condition plausibly more likely during emergencies affecting essential goods. In their model, policies bringing about below-market prices coupled with non-price rationing (purchase limits or lotteries) can improve welfare. The welfare benefit increases with supply and demand inelasticity and diminishes as either becomes more elastic. Since elasticity typically increases over time, their theory supports price constraints only in narrowly defined situations—such as emergencies with supply disruptions or demand spikes—and not under normal economic conditions.

Yet by the standards implied by the staff report, it is not clear that any of these analyses would be fully acceptable (even theoretical contributions relied upon in the staff report itself!). The staff report suggests that much of the criticism of price gouging laws relies on theoretical claims

¹⁷ Ramsi Woodcock, *The Efficient Queue and the Case Against Dynamic Pricing*, 105 *Iowa Law Review* 1759, 1762 (2020).

¹⁸ See generally David Shapiro, David Macdonald, Steven Greenlaw et al., *Principles of Macroeconomics* (3d ed., 2022), <https://openstax.org/details/books/principles-macroeconomics-3e>.

¹⁹ Martin L. Weitzman, "Is the price system or rationing more effective in getting a commodity to those who need it most?" *The Bell Journal of Economics* (1977): 517-524.

²⁰ Yeon-Koo Che, Ian Gale, and Jinwoo Kim, *Assigning Resources to Budget-Constrained Agents*, 80 *Review of Economic Studies*, 73 (2013).

²¹ Kominers and Dworzak, *A Price Theory of Price Gouging*, unpublished working paper, January 20, 2025. URL: <https://www.hks.harvard.edu/centers/mrcbg/programs/growthpolicy/price-theory-price-gouging>. (This work likely was released too recently to have been addressed in the staff report.)

without empirical support, and none of the articles presented above offer empirical support for their claims. For example, the behavioral economics argument suggests an availability bias leads sellers to raise prices too much and then the anchoring bias leads sellers to keep the too-high price for too long.²² Yet the staff paper reports that many competitive firms maintain price levels in the face of emergency-driven shifts in costs or consumer demand. If there is a behavioral bias at work, it may be an anchoring bias keeping consumers and sellers stuck to out-of-date prices. The staff report suggests, rather, a rational concern for reputation and future sales is behind competitive price stability.²³ Empirical work could help clarify which explanation best fits experience.

It's true that few theoretical articles directly model the kind of post-emergency price rules used in New York. But that limitation applies equally to the studies the staff report cites in support of its position. All economic models rely on simplifications, and their usefulness depends on how well they help us understand the situation at hand. Regardless of whether a study's conclusions align with a policy goal, it should be assessed with the same level of care and held to the same standard of relevance.

IV. Empirical Studies Related to Price Gouging Law Enforcement

A. Empirical Analysis of Price Gouging Laws and Related Analyses

The economic case for or against price gouging laws depends, in part, on how such laws work in practice. Theoretical arguments remain essential, but theoretical arguments should be complemented with careful consideration of experience including the use of qualitative and quantitative analysis. Price gouging laws are passed with a goal of reducing harmful exploitation during emergencies. What evidence suggests they accomplish this goal? The conventional opposition to price gouging laws suggests they can impair access to essential goods. Does careful data analysis find this effect?

Social systems are complex, and simplified economic theories—such as those underlying the conventional economic argument against price gouging laws—may miss important aspects of real-world behavior. Whether a theory is adequate, or whether a policy achieves its intended goals, can only be determined through engagement with actual evidence. Empirical analysis is essential not only to test the claims of critics, but also to evaluate the assumptions and predictions embedded in the arguments for enforcement.

²² Rapp, *op. cit.*, pp. 557-559.

²³ Staff report at p. 10, footnote 31.

The staff report quotes Max Helveston to support the claim that critics of price gouging laws rely mostly on theory and neglect relevant qualitative data.²⁴ But Helveston does not identify what qualitative data he has in mind, and his article includes no empirical analysis of its own. He also dismisses existing economic studies for methodological flaws without explaining what those flaws are.²⁵ As a result, the quote functions more as rhetoric than as evidence and does little to clarify the actual state of the research.

This section surveys several empirical studies, both articles cited in the staff report and others, to assess available evidence on the consequences of price gouging laws. The staff report's selective skepticism leads it to downplay or disregard findings that challenge its assumptions, while embracing other studies with less scrutiny when they support its preferred conclusions. The staff report's only discussion of methodological issues involved in studying price gouging laws is an extended footnote challenging the relevance of two studies suggesting price gouging laws were counterproductive. The comments here seek to balance the evaluation of empirical studies.

B. Gasoline Markets

After Hurricanes Katrina and Rita in 2005, Congress asked the Federal Trade Commission to examine whether gasoline price spikes reflected market manipulation or price gouging.²⁶ The FTC (2006) found that most increases in prices tracked supply disruptions and rising crude oil costs. For the purposes of its study, the FTC defined price gouging narrowly—as a price increase not explained by costs or broader market trends. The OAG staff report criticizes this choice, arguing it “reflects an anti-regulatory bias” and effectively “defined price gouging out of existence.”²⁷ Yet in the absence of a standard legal or economic definition for price gouging, the FTC's approach simply followed language the Congress used in mandating the study. It might be worth noting that the state of New York received over 3,000 complaints about gasoline price gouging in the aftermath of Hurricanes Katrina and Rita but charged just 15 gas stations of over 7,000 gas stations statewide.²⁸ Despite the staff report's quibbles over definitions, the New York

²⁴ Staff report at 18, citing Max N. Helveston. “Regulating Economic Opportunism in Postdisaster Markets.” *North Carolina Law Review*, 102 (2023): 811 at page 847.

²⁵ Helveston, p. 847.

²⁶ Federal Trade Commission, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (2006); URL: <https://www.ftc.gov/reports/federal-trade-commission-investigation-gasoline-price-manipulation-post-katrina-gasoline-price>.

²⁷ Staff report at 18-19.

²⁸ Kenneth Lovett, Fuming Gas-Gouge Claims Fuel Spitzer Probe, *New York Post*, Sep. 28, 2005. <https://nypost.com/2005/09/28/fuming-gas-gouge-claims-fuel-spitzer-probe/>. Reuters, Spitzer fines gas stations over price gouging, *NBC News*, December 19, 2005. <https://www.nbcnews.com/id/wbna10532906>. Public Retail Gasoline Stations by State and Year, U.S. Energy Information Administration (dataset). Last visited April 10, 2025. URL: https://afdc.energy.gov/files/u/data/data_source/10333/10333_gasoline_stations_year.xlsx.

attorney general's office came to similar conclusions as the FTC: price gouging was rare among gasoline retailers after 2005 hurricanes.

Montgomery et al. (2007) used numerical simulations to estimate that a federal price gouging law, if applied to gasoline markets after Hurricanes Katrina and Rita, would have increased total damages from the storms by up to \$2.9 billion. The authors conclude that because such laws suppress supply responses, they prolong shortages and encourage costly non-price rationing. Most strikingly, the authors show that price controls perversely concentrate harm in disaster-struck areas. By limiting local price increases, the laws reduce incentives to divert fuel from other regions, preventing a market response that would spread the burden more broadly. The OAG staff report downplays the study, calling its analysis speculative and not reflective of New York's statute. Yet this dampening effect on resupply efforts is exactly what the conventional economists' explanation predicts. The paper's model may help explain why, in the aftermath of Superstorm Sandy, gasoline retailers in New York City and northern New Jersey struggled to obtain supply while the nearby Philadelphia-Camden market remained well-supplied and saw only modest price effects.²⁹

Using millions of station-level price observations in Florida and Louisiana across multiple hurricanes from 2004 to 2008, Beatty et al. (2021) found no evidence of widespread gasoline price gouging.³⁰ On average, retail margins fell after landfall, and most stations that remained open sold fuel at lower-than-usual markups. A few stations raised prices significantly, but these cases were rare and showed no systematic pattern. The authors suggest this restraint may reflect reputational concerns—or fear of legal exposure. The Beatty et al. results straightforwardly complement the FTC's post-Katrina findings: price spikes were largely driven by input costs and supply disruptions, not market manipulation. Just as the FTC found, extreme prices were rare. Gasoline price and retail margin dynamics during market disruptions tend to be quite similar to ordinary market dynamics for products with volatile input prices.³¹ Together, these studies suggest that market dynamics and informal constraints often limit pricing behavior, even in the absence of strict enforcement. The staff report does not address the Beatty et al. article.

²⁹ Brian Ianieri, "Hurricane Sandy keeps gas prices up in state," *Press of Atlantic City*, November 11, 2012. See also Michael Giberson, "Mark Thoma on Price Gouging," *Knowledge Problem*, blog, November 7, 2012.

<https://knowledgeproblem.com/2012/11/07/mark-thoma-on-price-gouging/>.

³⁰ Timothy Beatty, Gabriel E. Lade, and Jay Shimshack. "Hurricanes and gasoline price gouging." *Journal of the Association of Environmental and Resource Economists* 8, no. 2 (2021): 347-374.

³¹ Matthew Lewis (2011), Asymmetric Price Adjustment and Consumer Search: An Examination of the Retail Gasoline Market. *Journal of Economics & Management Strategy*, 20: 409-449. <https://doi.org/10.1111/j.1530-9134.2011.00293.x>. For a similar assessment of grocery pricing behavior see Timothy J. Richards, Miguel I. Gómez, and Iryna Printezis, "Hysteresis, Price Acceptance, and Reference Prices." *American Journal of Agricultural Economics* 98, no. 3 (2016): 679–706. <http://www.jstor.org/stable/24739984>.

C. Grocery Stores

Scheitrum, Schaefer, and Saitone (2023) studied retail egg markets during the early months of the COVID-19 pandemic and concluded that “price gouging litigation led to a dramatic change in US food retailer behavior, which persisted” well past the resolution of the litigation.³² They document that even as input costs rose sharply, many retailers froze egg prices, reduced advertising, and limited purchases—leading to more frequent empty shelves. The staff report criticizes the Scheitrum et al. study for assuming price gouging laws impose rigid price limits, but at the time no state had provided guidance on cost allocation. Malone, Schaefer, and Lusk (2022) similarly found that while retail and farm-gate prices for table eggs spiked during early weeks of the pandemic, marketing margins remained stable—indicating that the increases reflected upstream cost pressures, not retailer profiteering. They highlight the consumer benefit of the FDA’s temporary suspension of food distribution rules, which allowed eggs from the foodservice supply chain to flow into grocery store supply networks and help ease shortages.

D. Rebuilding and Wages

A recent study by Kim, Shahandashti, and Yasar (2023) compares post-Hurricane Sandy rebuilding activity in Virginia and Maryland—two neighboring states hit by the same storm, but with one key difference: Virginia had an anti-price gouging law in effect, Maryland did not.³³ Using a difference-in-differences method, the researchers find that Virginia counties issued significantly fewer building permits than expected after the storm than comparable Maryland counties. The authors conclude the law slowed reconstruction. In a second study looking across the U.S., the same authors find that reconstruction wages were about 2.5% lower in counties where price gouging laws were triggered after disasters.³⁴ Earlier work by Michael Tarrant (2015) reported similar results.³⁵ Studying hurricane-hit counties over several decades, Tarrant finds short-term wage suppression in states with anti-price gouging laws, with clear evidence for the accommodations industry and weaker evidence of wage suppression for construction. However, Tarrant does not find evidence of a wage suppression effect for gas stations or grocery stores. These laws appear to hold down post-disaster wages, and therefore costs to businesses in the sector and *possibly* help restrain price increases, but as a result may cause the short run supply to be more inelastic when demand spikes at least in the accommodation and

³² Daniel Scheitrum, K. Aleks Schaefer, and Tina Saitone. "Food retailer response to price gouging litigation." *Applied Economic Perspectives and Policy* 45, no. 4 (2023): 2127-2140.

³³ Sooin Kim, Mohsen Shahandashti, and Mahmut Yasar. "Effect of Anti-Price Gouging Law on Postdisaster Recovery Speed: Evidence from Reconstruction in Virginia and Maryland after Hurricane Sandy." *Natural Hazards Review* 24, no. 4 (2023).

³⁴ Sooin Kim, Mohsen Shahandashti, and Mahmut Yasar. "Empirical Investigation of the Effect of Anti-Price-Gouging Law on Postdisaster Reconstruction Wages." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 16, no. 4 (2024).

³⁵ Michael Steven Tarrant. *The effects of anti-price gouging laws in the wake of a hurricane*. MS Thesis in Applied Economics, Montana State University, 2015.

construction industries. Tarrant finds the effect short-lived, prominent only in the quarter of the triggering disaster. Counties with price gouging laws “catch up” to counties without them relatively quickly in subsequent quarters.

E. Price Gouging and Inflation

The staff report favorably cites Weber and Wasner (2023) in several footnotes to support the view that firms with market power used recent crises to raise prices and expand profit margins, presenting this as background for concern about market concentration and profiteering.³⁶ The Weber and Wasner study itself presents a conceptual account of so-called sellers’ inflation. However, it does not examine the effects of price gouging laws, nor does it assess whether prices or profit margins were higher or lower in jurisdictions with price gouging laws. Rather than measuring market concentration, Weber and Wasner rely on theories of market power, firm-level anecdotes, earnings calls, and prior literature to build a narrative about pricing power. The result is a conceptual argument for price controls as macroeconomic policy of little use for evaluating New York’s price gouging law.

The empirical studies surveyed provide somewhat weak guidance for refinement of New York’s price gouging law. The staff report argues supplier and consumer behavior during abnormal market disruptions differs in important ways from more normal conditions, but none of the studies offered much support for the position. Retail markets as different as gasoline and grocery store eggs show retailers squeezed when wholesale costs rise because consumers resist paying higher than expected prices. Consumer price expectations adjust over time, but often abnormal market conditions end faster than consumers adjust expectations. Retailers report concern over reputational effects and for potential price gouging enforcement when discussing price restraint, but none of the articles surveyed directly addressed the point. The comparative study of Virginia and Maryland construction activity may be relevant. Maryland businesses at the time did not face a price gouging law, so any pricing restraint would have been voluntary. The authors of that study do not consider the issue.³⁷

F. Price Gouging Laws and Consumer Hoarding

The staff report discusses hoarding behavior as a secondary justification for price gouging laws, primarily aiming to rebut a standard economic argument that higher prices discourage

³⁶ Isabella M. Weber and Evan Wasner. “Sellers’ inflation, profits and conflict: why can large firms hike prices in an emergency?” *Review of Keynesian Economics* 11, no. 2 (2023): 183-213.

³⁷ While outside of the scope of this proceeding, price gouging enforcement would benefit from greater transparency. If, as the staff report contends, existing studies are largely inapplicable to New York’s distinct legal approach, then providing publicly accessible data on past New York enforcement actions—including consumer complaints, case outcomes, remedial frameworks, and data on prices, margins, and profits—would promote future empirical work more obviously of relevance. Such work could, in turn, inform future enforcement strategy and contribute to improved policy outcomes.

overbuying during emergencies. The staff report instead argues that hoarding is not reduced by higher prices; it is merely redistributed from a broader population toward more affluent buyers. In this telling, price gouging laws do not exacerbate hoarding—they simply make it more equitable. To support their view of hoarding, the staff report references three main sources: a USDA study (Childs and Kiawu, 2009) discussing panic buying during the 2008 global rice crisis; an empirical study by Hong et al. (2015) analyzing U.S. household rice purchasing during that same crisis; and Keith Sharfman’s (2007) law-and-economics account of Talmudic hoarding restrictions in ancient Babylon.³⁸

None of these sources provides strong support for the report’s claims about hoarding, nor do they consider the interaction of price gouging laws and hoarding activity. The USDA report describes large-scale panic buying by developing-country governments, not individual household behavior, making it a tenuous basis for claims about how New York consumers might respond to emergency price constraints. The Hong et al. study does focus on U.S. households but does not examine differences in purchasing behavior across income levels nor consider what effects price controls would have on hoarding behavior. Finally, Sharfman provides a rational-actor account of hoarding under price ceilings that is rooted in Weitzman’s (1991) shortage model.³⁹ Ironically, while citing the Sharfman article in support of a claim about anti-hoarding laws, elsewhere the staff report dismisses the Weitzman (1991) article Sharfman relies upon because it examines price ceilings rather than the profit-margin restrictions of New York’s price gouging law.⁴⁰

In contrast to the light-touch treatment given to supportive sources, the staff report provides its only extended methodological critique in a long footnote discussing two empirical articles by Chakraborti and Roberts.⁴¹ These studies—one examining web searches, the other analyzing store visitation data—suggest that price gouging laws may have contributed to shortages and greater in-person shopping during COVID-19. Apparently because the findings suggest price gouging laws harmed consumers, the staff report seeks to dismiss them as irrelevant. Every empirical study has limitations, but the staff report would be better served by applying its standards more consistently across the studies it considers. It is hard not to notice the

³⁸ Nathan Childs and James Kiawu. “Factors behind the Rise in Global Rice Prices in 2008.” United States Department of Agriculture, Economic Research Service. (2009), <https://www.ers.usda.gov/publications/pub-details?pubid=38490>; Hong, Harrison, Áureo De Paula, and Vishal Singh. Hoard behavior and commodity bubbles. No. w20974. National Bureau of Economic Research, 2015; Keith Sharfman. The law and economics of hoarding. *Loyola Consumer Law Review*, 19, 179. (2006-2007).

³⁹ Sharfman, p. 180.

⁴⁰ Staff report at p. 16, footnote 65.

⁴¹ Rik Chakraborti and Gavin Roberts. “Learning to hoard: The effects of preexisting and surprise price-gouging regulation during the COVID-19 pandemic.” *Journal of Consumer Policy* 44 (2021): 507-529. Rik Chakraborti and Gavin Roberts. “How price-gouging regulation undermined COVID-19 mitigation: County-level evidence of unintended consequences.” *Public Choice* 196, no. 1 (2023): 51-83.

inconsistency in relying on remarks about foreign government rice buying in 2008 and Talmud-era Babylonian marketplace practices, while dismissing two studies directly examining the effects of price gouging laws on U.S. consumer behavior during recent market disruptions.

V. Applications to Proposed Rulemakings

The Economic Case for Price Gouging Laws was issued alongside several notices of proposed rulemaking intended to clarify how New York’s price gouging statute will be enforced. Having reviewed the economic assumptions, theories, and empirical evidence surrounding price gouging, I offer a few observations on the proposed rules. Each comment highlights a point where economic analysis may bear on the regulatory design choices or the interpretation of a given provision.

A. Comment on § 600.1(e) and (f): Definitions of “Essential Products” and “Goods and Services”

A footnote in the staff report insists that webcams were covered under New York’s price gouging law during the COVID-19 emergency.⁴² But webcams only fit the proposed definitions if “welfare” is interpreted expansively and “personal, family, or household” is stretched to include work-related activities. If “welfare” includes all work-related tools or comforts, and “personal use” covers anything purchased by a consumer, it’s unclear what these definitions exclude. Public reporting during the pandemic reflected the opposite understanding—for example, one ABC News story quoted a New York City consumer protection official stating that price gouging rules did not apply to webcams.⁴³ When statutory definitions are this elastic, and knowledgeable observers disagree about scope, sellers face uncertainty, undermining the premise that the law targets profiteering in core necessities. Tighter definitions would help align public expectations, enforcement, and the economic rationale offered in the staff report.

B. Comment on § 600.5: Pre-Disruption Price Determination/Dynamic Pricing

The rule’s benchmarking system for dynamic pricing, while carefully designed, seems aimed at limiting price flexibility even when that flexibility increases supply. This consequence appears at odds with the staff report’s own economic rationale, which focuses on discouraging markup increases that fail to elicit more supply. Empirical evidence suggests dynamic pricing can expand availability through real-time incentives. Penalizing it, even when it increases supply, risks

⁴² Staff report at p. 15, footnote 53.

⁴³ Prithvi Tikhe, “As millions work from home, some online buyers see shortages, price jumps in at-home tech,” ABC News, April 5, 2020. <https://abcnews.go.com/US/millions-work-home-online-buyers-shortages-price-jumps/story?id=69980213>. The article subhead reads, “Price gouging rules generally do not apply to non-essential devices.” The article reported the the New York City Department of Consumer and Worker Protection had received over 4,600 price gouging complaints, but “none of those related to portable devices like webcams”

undercutting one of the few mechanisms that enhance elasticity and thereby support resiliency during disruptions.

C. Comment on § 600.8: Cost Definition and Allocation Methods

The staff report justifies enforcement on the grounds that price increases are objectionable when they shift surplus to sellers without adding new supplies. It follows that price increases should be allowed when they do boost supply. But § 600.8 defines eligible cost increases so narrowly that sellers may be unable to recover legitimate short-term costs—like hazard pay, rush delivery, or refrigeration—required to stay open or scale up. These may be essential to sustaining supply yet could be disallowed under the rule’s current framing. That’s especially problematic for firms with fixed overhead or compliance costs that can’t be easily attributed to specific products. The resulting uncertainty may push sellers out of disrupted markets entirely, even when they could help meet demand.

D. Comment on § 600.9: Geographic Scope

The proposed treatment of geographically remote sellers—particularly internet-based vendors—conflicts with the staff report’s economic rationale. Most online sellers lack market power, and their participation typically expands the supply of essential goods available to New Yorkers. Penalizing them may discourage participation during disruptions, making supply more inelastic, not less. Unless an out-of-state seller contributes directly to shortages in New York, it should not face liability under the statute.

VI. Conclusion

Elsewhere, I’ve raised broader concerns about price gouging laws, including objections grounded in conventional economic analysis.⁴⁴ These laws risk deterring helpful market responses at the very moment consumers need goods most. Whether these laws should remain on the books is a question for legislatures to decide. But once enacted, administrative agencies have a responsibility to enforce the laws in ways that are economically grounded, transparent, and consistent with their statutory purposes. Attorneys general retain significant discretion in how they pursue enforcement. Even in the absence of legislative change, that discretion creates room to refine enforcement strategies. In that light, the New York Attorney General’s rulemaking effort is a welcome one. Other states with similar laws could benefit from similarly deliberate efforts to clarify enforcement standards and improve predictability.

While the staff report aspires to provide an economic rationale for enforcement, it falls short. Its treatment of theory is selective, and its use of evidence is inconsistent. These weaknesses limit

⁴⁴ Michael Giberson. “The problem with price gouging laws.” *Regulation* 34 (2011): 48.

its value in the rulemaking process. Still, some elements of the staff report have merit, and I have engaged with them where they can help improve the proposed rules.

Careful economic analysis helps translate broad legal mandates into enforcement strategies that are more effective, predictable, and fair. Even for laws one might question, rigorous analysis serves the public interest by helping regulators anticipate unintended consequences, clarify rules, and reduce harm. This critique is offered in that spirit: to promote better governance and more effective regulation within the existing legal framework.

Respectfully submitted,

/s/ Michael A Giberson

TO: Office of the New York Attorney General, Consumer Frauds and Protection Bureau

FROM: Christopher Cernik and Jane McLaughlin

DATE: April 11, 2025

RE: Public Comments on Proposed Price Gouging Regulations

Greenberg Traurig represents numerous business clients ranging from global enterprises to family-owned business. While the proposed price gouging regulations establish a framework to ensure consumer protection during market disruptions, they inadvertently create ambiguity and potential challenges for many businesses, particularly those operating in dynamic, regional, or seasonal markets. To address these issues, we propose amendments to the draft regulations to better account for market fluctuations, clarify the scope and applicability of emergency declarations, refine the presumption of price disparities, and reconsider the heightened scrutiny on businesses holding so called dominant market positions. By incorporating these revisions, the final regulations can strike a fairer balance between consumer protection and the practical realities of business operations, ensuring compliance is feasible without unduly penalizing standard pricing practices. On behalf of our clients that will become part of the regulated community upon adoption of the regulations, we offer these recommendations to foster a regulatory framework that is equitable, transparent, and adaptable to varied economic scenarios, while protecting consumers from inequitable price increases.

I. The Proposed Rule Fails to Account for Typical Market Fluctuations

The proposed regulations establish a test to determine pre-disruption prices. For sellers that employ dynamic pricing, the regulations define the pre-disruption price as either the price charged to the same buyer or a similar-type buyer within the 30 days preceding the benchmark date (when the price does not vary buyer to buyer), or the median price charged to all buyers for the same essential product in NYS within the 30 days preceding the benchmark date (when the price varies buyer to buyer). This pre-disruption price is used to discern whether a price charged is unconscionably excessive.

In establishing this formulaic approach to establish a pre-disruption price, the proposed regulations fail to recognize the implications for industries where pricing reflects seasonal and cyclical supply/demand such as global travel, tour, and hospitality companies such as airlines, national chain hotels, global rental car companies, Amtrak, commercial buses, theaters, etc. The regulations should incorporate language that exempts price differences based on seasonal or cyclical factors. Other states have adopted this approach:

- *VA – “In determining whether a price increase is unconscionable, the following shall be considered: . . . Whether the increase in the amount charged by the supplier was attributable solely to a regular seasonal or holiday adjustment in the price charged for the good or service.*

Proof that the supplier regularly increased the price for a particular good or service during portions of the period covered by the time of disaster would be prima facie evidence that the price increase was not unconscionable during those periods.”

- *CT – “Nothing in this section shall prohibit the fluctuation in the price of items sold at retail which occurs during the normal course of business.”*
- *IA – “The existence of an excessive price shall be presumed from a substantial increase in the price of any merchandise over the price at which the merchandise was sold or offered for sale in the usual course of business immediately prior to the onset of the emergency.”*
- *NJ – “A price shall be deemed excessive if: (1) The price exceeds by more than 10 percent the price at which the good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of emergency...”*
- *RI – “This section shall not prohibit the fluctuation in price of essential commodities that occur during the normal course of business.”*
- *SC – “A price increase that reflects the usual and customary seasonal fluctuation in the price of the subject essential commodity or the rental or lease of a dwelling unit or self-storage facility is not a violation of this section.”*

Along the same lines, other states include a general “safe harbor” provision relating to regional, national, or international markets:

- *NC – “In determining whether a price is unreasonably excessive, it shall be considered whether: . . . (3) The price charged by the seller is attributable to fluctuations in applicable commodity markets; fluctuations in applicable regional, national, or international market trends...”*
- *OR – “The amount charged for the essential consumer goods or services exceeds by 15 percent or more the price at which the same or similar consumer goods or services were readily obtainable by other consumers in or near the geographical area covered by the declaration of an abnormal disruption of the market.”*

We offer the following proposed amendments to the draft regulations to address these concerns:

600.1(p) Definitions

- (a) *Usual Course of Business.* Methods or practices used or prices offered or charged in “the usual course of business” are methods or prices the seller employed, offered or charged either prior to the onset of the disruption at issue with respect to the scrutinized sale, or prior to the time at which the seller knew or had reason to know that the disruption would occur, whichever is earlier. Increases in the amount offered or charged by a seller that are attributable to a regular seasonal or holiday adjustments in the price for a particular good or service during the abnormal disruption in the market shall be a method or practice used in the usual course of business. A method or practice adopted prior to a disruption that specifies an alteration in practices or prices during a disruption, or a method or practice that a reasonable person would

conclude was implemented for the sole or dominant purpose of enabling the seller to increase prices or alter the seller's accounting of costs or profits during a disruption or in the lead up to a disruption, is not a method or practice used in the usual course of business.¹

600.2 Unconscionably Excessive Prices

(g) The price in a scrutinized sale shall not be deemed unconscionably excessive where the fluctuation in the price occurred during the usual course of business or was attributable to regional, national, or international market trends.

II. The Proposed Rule Should Provide Clarity Regarding State of Emergency Declarations

One of the most consistently vexing problems facing businesses is the statutory linkage between the abnormal disruption of the market and the declaration of a state of emergency (SOE). This manifests itself in several ways. For the purposes of illustration, we will assume that the SOE lasts for 30 days as a matter of default. And, to be sure, none of our clients would be looking to raise prices during these periods of disruption; but since pricing for many businesses can be affected by factors that have nothing to do with any of the events listed in GBL §396-r(2)(b), the extended duration of SOEs can create an unnecessarily chilling effect.

Scenario #1. A threatened weather event that would surely result in a market disruption causes the Governor to declare a state of emergency for Long Island and New York City. The storm ends up bypassing eastern New York altogether. Nevertheless, the SOE remains in effect. Technically, there was no actual market disruption, but the lingering existence of the SOE causes uncertainty.

Scenario #2. The Governor calls for a State of emergency for the entire State of New York due to a storm threatening the northeast. The storm ends up impacting the Western New York region only and causes market disruption there. Nevertheless, the SOE exists throughout the State for 30 days. Again, while logically, a business on unaffected Suffolk County might assume that there is no disruption in the marketplace – the coupling of the two when a SOE is declared results in uncertainty.

Scenario #3. This time the Governor knows in advance that a winter weather event is just going to impact Western New York and declares a five-county SOE. Again, there is a disruption in the market for a few days – but if the snow is cleared in three days and business is back to normal in seven, are businesses constrained to adhere to the pricing limitations for 23 more days, even though the abnormal market disruption has subsided?

Scenario #4. The Governor declares a state emergency due to a shortage of nurses in New York hospitals. That clearly falls within §396-r(2)(b). But, since §396-r(2)(a) is so expansive – how will businesses really know whether their products or services are

¹ Note that the proposed use of the word “offered” relates to our concerns regarding the 10% disruption, discussed *infra*. Conforming amendments would be needed in Section 600.5 of the Rule.

necessary for the health, safety, and welfare of consumers during a nursing shortage. Again, the linkage is problematic.

Since the regulations cannot supersede or conflict with the statute, we recommend that 1) the definition of “triggering event” be revised to set parameters regarding which SOEs trigger applicability of the price gouging rules and to also require critical information for the regulated community regarding the scope of the SOE and 2) the regulations specify that a price shall not be deemed unconscionably excessive where a business can demonstrate that (1) the market disruption has either ended before the SOE expired; (2) that the market disruption was geographically limited despite a statewide SOE; or (3) the goods or services provided by the business were in no way related to the SOE. Notably, other states with price gouging statutes, such as Connecticut, North Carolina, New Jersey, Pennsylvania, South Carolina, and Virginia, are careful to apply to conduct within a limited geographic region, and not statewide by default. Specifically, these statutes apply to conduct that falls within: (1) an area designated in the SOE; or (2) an area that is impacted by the circumstances giving rise to the SOE as determined by facts.

We offer the following proposed amendments to the draft regulations to address these concerns:

Section 600.1(a)(2) Definitions

Triggering Event. A “triggering event” means one or more of (i) stress of weather, (ii) convulsion of nature, (iii) failure or shortage of electric power or other source of energy, (iv) strike, (v) civil disorder, (vi) war, (vi) military action, (vii) national or local emergency, (viii) drug shortage, or (ix) other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the Governor. To be considered a triggering event under this Rule, the associated state of emergency declaration must specify the triggering event, affirmatively state that an abnormal market disruption has occurred, and specify both the geographic scope and duration of the state of emergency declaration based on the available information about the triggering event at the time of the declaration.

Section 600.2 Unconscionably Excessive Prices

(h) The price in a scrutinized sale shall not be unconscionably excessive where (1) the abnormal market disruption has either ended before the state emergency expired; (2) notwithstanding a statewide state of emergency declaration, the abnormal market disruption was geographically limited; or (3) the goods or services provided by the business were in no way related to the state of emergency declaration.

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

(a) *Locations of Offerings for Sale for Price Gouging Statute Purposes.* The prohibition of General Business Law § 396-r shall apply to the offering for sale of an essential product by a seller if the offer for sale is made in the area of the State impacted by the abnormal disruption of the market as identified in the applicable state of emergency declaration.

III. The 10% Presumption Fails to Account for Common Advertised Pricing Practices

The proposed regulations establish a rebuttable presumption that during a disruption, the sale of an essential product at a price that is greater than 10% of that essential product's pre-disruption price represents a gross disparity in price. While the proposed regulations allow a business to rebut the presumption if the seller can demonstrate that the cost increase was necessary to preserve its pre-disruption profit margin, the draft regulations should also allow a seller to rebut the presumption where the seller's prices were advertised, e.g., posted on its website, prior to the abnormal economic disruption and continued to be offered by the seller throughout the disruption.

We offer the following proposed amendments to the draft regulations to address these concerns²:

600.2 Unconscionably Excessive Prices

(g) The price in a scrutinized sale shall not be deemed unconscionably excessive where the fluctuation in price was consistent with a seller's advertised prices that were displayed prior to the triggering event and not attributable to the abnormal economic disruption.

600.6 (b) Gross Disparities Between Post-Disruption and Pre-Disruption Price

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

IV. The Proposed Rule Unfairly Targets Businesses Holding Dominant Market Positions

The draft regulations establish a rebuttable presumption that a seller has engaged in unfair leverage of market position if the seller holds a dominant market position or disproportionate market position. While there may be a rational basis for this increased level of scrutiny in the antitrust space, it hardly seems appropriate for consumer products. The controlling statute and these proposed regulations clearly define prohibited behavior whether a market is the sole source in town or one of several chains. Furthermore, in enacting the underlying statute, the Legislature did not contemplate that a regulated entity's market share or position should be used to discern whether a price is unconscionably extreme or whether an entity employed unfair leverage to raise its prices. And while we acknowledge that the canons of administrative law afford an executive agency the discretion to further define statutory terms through the regulatory process, we call into question the perception that a business's market position is dispositive as to whether it charged an

² See comments in FN 1.

unconscionably excessive price to its customers during a market disruption. Price gouging is price gouging, whether committed by a larger corporate entity or a mom-and-pop shop. Accordingly, we respectfully request that the Attorney General's Office eliminate these provisions from the final adopted regulations.

April 13, 2025

BY EMAIL – stopillegalprofiteering@ag.ny.gov

Honorable Letitia James
New York State Attorney General
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

RE: Comment on Price Gouging Proposed Rulemaking Pursuant to New York General Business Law Section 396-r(5) – I.D. Nos. LAW-06-25-00005P, LAW-06-25-00006P, LAW-06-25-00007P, LAW-06-25-00008P, LAW-06-25-00009P, LAW-06-25-00010P, LAW-06-25-00011P, LAW-06-25-00012P

Dear Attorney General James:

These comments are submitted on behalf of The Business Council of New York State, Inc. (BCNYS), New York’s largest statewide business association, with more than 3,500 members in a wide range of business sectors, including many that could be directly impacted by these proposed regulations related to the state’s price-gouging statute, General Business Law § 396-r. These rules were proposed by the Office of the Attorney General (OAG) and published in the New York State Register on February 12, 2025. For consistency, BCNYS provides comments on all the above-mentioned rulemaking proposals in a single comment letter and asks OAG to include and consider these comments in each of the eight dockets.

Many concerns remain from previously considered proposed rules that were published in the New York State Register on March 22, 2023, to which BCNYS submitted comments on May 19, 2023, and are echoed below.

BCNYS believes rulemaking is supposed to ensure that parties, in this case, businesses, have clarity and guidance to interpret the statute’s text. However, these proposed rules only create more uncertainty rather than resolve statutory uncertainty. Instead of clarifying the law, OAG expands and exceeds its regulatory authority under the statute and, in some cases, goes directly against the plain language of the statute.

If adopted as proposed, these rules would create significant uncertainty for large, medium, and small businesses in New York, and present numerous operational and compliance challenges. These comments focus on several specific concerns we have with this proposal and offer alternatives that would result in a certain, more workable regulatory regime.

- **The proposed rules fail to require a specific emergency declaration for an “abnormal disruption of the market” or otherwise provide clarity on the timing, affected goods, or geographic scope of such disruptions.**

An emergency declaration by the governor of an “abnormal disruption of the market” should be required for enforcement. The price-gouging statute (GBL § 396-r), by its terms, is triggered during periods of “abnormal disruptions of the market.” However, the statute leaves significant ambiguity as to when an abnormal disruption of the market begins and ends. To provide

adequate notice to businesses and consumers alike, the statute should be interpreted to require a state of emergency declaration of an abnormal disruption of the market by the governor before its requirements come into force. The importance of that notice is, moreover, significantly heightened considering the increased requirements on businesses that the OAG is seeking to impose in this rulemaking.

Instead of taking the opportunity to provide greater clarity on this issue through this rulemaking, the proposed rules compound the ambiguity of the statute by taking the position that a state of emergency declaration is not required for enforcement of the statute. Nor do the proposed rules provide any other bright line rule for businesses to use to determine when the statute's requirements come into effect. The proposed rules thus simultaneously attempt to dramatically increase the statute's pricing restrictions, while also creating more ambiguity and providing inadequate notice to businesses as to when these requirements are enforceable. Without further clarification as to how an abnormal market disruption is determined (the text of the statute says "any change in the market...resulting from") businesses will be operating blindly and could unknowingly violate the law, thus being unfairly exposed to potential enforcement and significant civil penalty. For example, does this extend to "abnormal disruption of the market" events that occur in another state or country? How is a business to track these disruptions?

Additionally, the Governor has issued declarations of state of emergencies for many events. Most recently, Executive Order No. 47.3 was issued on February 19, 2025, declaring a state of emergency arising from a strike by corrections officers and the New York National Guard was activated to assist. Under the text of the statute, a "strike" constitutes an abnormal disruption of the market. But what essential goods or services would be impacted by this event? The text of the statute and the proposed rules state "or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor." Executive Order 211 declared a statewide disaster due to gun violence. Would this declaration by the Governor qualify as an "other cause" and constitute an abnormal disruption of the market? If so, what goods and services are impacted? In fact, New York is constantly under different declarations of state of emergency. Without a rule that the Governor must clearly declare when an "abnormal disruption of the market" begins and ends and what goods and services are included, OAG is effectively enacting de facto price caps on all goods and services which will strangle businesses, hamper innovation and harm New York's economic prosperity.

It does not need to be this way. Price-gouging statutes in most states, including Connecticut and Pennsylvania, specify how the market disruption must be declared and when it ceases, requiring formal emergency declarations by the governor. OAG should ensure that New York law does not provide less guidance to New York businesses than these states provide to theirs.

The proposed rules fail to provide clarity as to which goods and services are affected by an abnormal market disruption. Not every market disruption will impact all critical goods or services covered by New York's price-gouging law. Therefore, it should also be necessary that there be a formal declaration of the goods or services affected by the abnormal market disruption. Other states identify the impacted goods or services, whether required by their laws or in practice.

This is particularly important for goods and services (especially commodities such as produce or petroleum) that are bought and sold in national or world-wide markets, where some level of abnormal market disruptions occur on an almost-daily basis. For example, the war in Ukraine could be considered an abnormal market event that impacted global energy and grain markets; yet, years later, it is unclear whether that constitutes an abnormal market disruption triggering GBL § 396-r and this proposed rule, and, if so, which goods and services are affected, and how businesses should know when the market disruption is no longer in effect. Knowing when an abnormal market disruption starts and ends is critical to complying with the law. If a

business cannot be certain that it is compliant with statutory and regulatory requirements, this can dissuade businesses from responding to market forces in a way that provides both business and consumer benefits.

For these reasons, BCNYS believes that not only should a state of emergency declaration of an abnormal disruption of the market or other formal notice be required to commence the applicability of the statute (and when it ends) but also that such a proclamation of an abnormal market disruption should also identify what goods and services are affected. It is essential that New York's rules provide clear guiderails around an abnormal market disruption so that businesses can comply with the regulations.

The proposed rules fail to provide a mechanism for identifying which portions of the state are affected by an abnormal market disruption. Additionally, the proposed rules do not contemplate that only a particular geographic area might be affected by an abnormal market disruption, such as a disruption caused by a hurricane or snowstorm that only impacts one area of the state. Requiring a gubernatorial declaration of an "abnormal disruption of the market" or other means of clarification that specifies the affected areas would address this uncertainty. (See the following paragraph for an example on how an event in one area of the state should not apply to unaffected regions.)

The proposed rules fail to address the possibility of seasonal pricing fluctuations. Further, the rules do not allow for an exception for increased prices due to seasonal changes, an issue addressed by several states, including South Carolina and Virginia. This omission can compound the problems caused by a geographically overbroad application of the statute. For example, if a hurricane hits the Long Island region during the month of August, but has no effect on the Lake George region, and an abnormal market disruption is declared due to that disruption, it could have grave economic consequences for the heavily seasonal, tourism-dependent economy of the Lake George area if the declaration does not specify the region or goods and services affected, especially if that declaration were to apply to hotel rooms. Each region of New York flourishes at different times of the year, with many regions reliant on the revenue from their peak tourist seasons. Because of the large geographic footprint of the state, not every disruption affects the entire state, and that should be accounted for in the proposed rules to guide businesses statewide.

The seasonality issue stands regardless of geographic location. If a hurricane hit Long Island just before Labor Day weekend, businesses will have already built in the increased demand for hotel rooms, rental cars, flights and so on. These price increases are built on market demand and could falsely be attributed to an abnormal market disruption. We recommend the inclusion of safe harbor language like that of Virginia or Kentucky.

The ambiguity left by the proposed rules will have harmful real-world effects. Without a declaration regarding the scope of an abnormal market disruption, including when the disruption begins and ends, OAG's proposed rules create a de facto price cap on goods or services. That would, among other things, diminish the incentives for businesses to invest in and expand production and distribution in New York State, to the detriment of every New Yorker. While statutory amendments addressing these concerns would be ideal, we strongly recommend that OAG's final rules provide a mechanism by which businesses will be made aware of when a disruption begins and ends, what goods and services are affected, which geographic areas are impacted and account for seasonal price fluctuations.

- **The proposed rules impose a draconian price cap on businesses based on “market share” when many businesses will not know how to define their market or what their share is.**

The issue of what constitutes a “market” or “market share” may be the most daunting question that looms over this rulemaking and the enforcement of § 396-r. This open-ended term could result in significant, adverse impacts on small businesses across the State. The rules directly link unfair leverage—and a draconian price cap of 0%—to a business’s market share (§ 600.4(b) & 600.4(c)(1)(i)&(ii)). This concept of “unfair leverage” is like the concept of “dominant position” as proposed in the Twenty-First Century Anti-Trust Act (S.335/A.2015). Neither that bill nor these proposed rules provide any criteria or guidance as to how an affected market is to be defined, and the definition within the proposed rules is circular, broad, anti-competitive and could capture ordinary business conduct. A market could be defined by a variety of factors including the good or service, geographic boundaries, or industry. Further, the rules do not provide for consistency in how this determination would be made. Calculating market share would require defining (1) the relevant product market, which are the products and/or services that are close substitutes, and (2) the relevant geographic market, which is the area where producers of such products and/or services compete. Determining product and geographic markets often requires complex and data intensive economic analysis to ascertain which products and/or services should be included in the market and the geographic area where the sellers of such products and/or services actually compete.

The absence of clear criteria for defining markets has the potential to result in hundreds of businesses, including small businesses, deemed to have “unfair leverage” within a market, and thus subject to the OAG’s draconian price cap of 0% (§ 600.4(c)(1) and §600.4(c)(1)(i)). For example, if a butcher is the only butcher in town, they would arguably have 100 percent of the market share for that town; such that any price increase during an abnormal market disruption that may increase profit margins, however slightly, would be in violation of these proposed regulations.

Section 396-r(3) clearly states “whether a price is unconscionably excessive is a question of law for the court.” Yet, within the proposed rules, OAG strips the courts of its authority to make this determination and instead creates the presumption of “unfair leverage,” when a business need only have limited “market share” for the 0% price cap to apply. The rules define “unfair leverage” to exist when a single business raises prices *any* amount (“greater than the pre-disruption price”) and has more than 30 percent of a “market,” or a market share greater than 10% and that relevant market has a Herfindahl-Hirschman Index (HHI) of 1,800 or more (§ 600.4(c)(1)(i)&(ii)). Thus, under the proposed regulation, unfair leverage will be presumed for any price increase by a business with 30% market share or greater than 10% market share and a limited number of large competitors, even for a small business operating in a highly competitive and fragmented market.

In most cases, this means that a market of five competitors that each have a market share greater than 10% would be presumed to have “unfair leverage of market position.” For example, a market with five competitors that have shares of 14%, 18%, 20%, 22% and 26% has a HHI of 2080, which by definitions prescribed by OAG, they would each be presumed to have “unfair leverage of market position” and prohibited from even a \$0.01 increase above the pre-disruption price during an “abnormal disruption of the market.”

But it could also extend to markets with six competitors which would establish anti-competitive and anti-consumer behavior by allowing a competitor to raise prices more than their competitors. For instance, say a “market” has six competitors at the following market share percentages: 8%, 11%, 20%, 20%, 20%, and 21%, which equates to a HHI of 1826. By no means is that what any legitimate economist, or consumer, would consider a concentrated market. However, under OAGs proposed rules, it would presume “unfair leverage of market position” on five of the six competitors, prohibiting them from raising prices even \$0.01 above the pre-disruption price while allowing their competitor (who holds 8% “market share”) the ability to raise their prices by up to 10% of the essential product’s pre-disruption price (§ 600.6). Given that New York could effectively be under a constant “abnormal disruption of the market,” these rules are instituting price caps indiscriminately and unjustifiably on New York businesses.

Without knowing the scope of a market and its geographic footprint, whether local, regional, national, or international, and conclusively defining those terms for a business to comply with the final rules, a business would be unable to determine whether it is operating with or without unfair leverage and whether the provisions of § 396-r and these regulations apply. The proposed rules—aimed at “unconscionably excessive” price increases—should not be interpreted to apply 0% or 10% pricing restrictions on everyday businesses without, at a minimum, greater clarity as to which businesses and essential goods or services are subject to such restrictions.

Moreover, were the scope of the market known, the proposed 0% price cap in certain markets is unfaithful to the statute and exceeds the OAG’s rulemaking authority. Under GBL § 396-r(2), “unfair leverage” is not an independent standard but *one* of the factors a court *may* consider to find a price to be “unconscionably excessive.” But “unconscionably excessive” plainly cannot, and should not, be read to prohibit a \$0.01 or 1% price increase, no matter how concentrated the market or how essential the good or service. As previous examples show, a market does not even have to be concentrated to prohibit a slight price increase under OAGs proposed rules. In fact, the proposed rule is so divorced from the statutory language that it likely violates New York’s “strong” non-delegation doctrine, as was held to be the case for the NYC Health Department’s soda ban.

Taking these provisions on “unfair leverage” together, a business with the arbitrarily chosen shares of 30% (or even just over 10%) of an undefined market will be presumed to be in violation of § 396-r for *any* cost increase. By improperly integrating certain antitrust concepts into this rule, BCNYS fears OAG may be opining on what OAG believes market competition should look like. In doing so, OAG is penalizing efficiency and success with a de facto price cap for certain competitors, thus stifling innovation and competition that benefits New York consumers. This was plainly not the Legislature’s intention and could have significantly detrimental effects on the New York marketplace and its consumers.

➤ **The 10% price increase threshold is also inconsistent with the statute and unjustified.**

As stated earlier, §396-r(3) clearly states “whether a price is unconscionably excessive is a question of law for the court.” Yet, within the proposed rules, OAG strips the courts of its authority to make this determination. Instead, OAG arbitrarily establish a 10% price increase limitation from pre-emergency pricing as the presumptive threshold for a “gross disparity” in pricing. This is inconsistent with the statutory prohibition of “grossly” or “unconscionably”

excessive price increases. Such price fluctuations are not unusual for many products when an abnormal disruption of the market occurs and thus hardly “unconscionable.” BCNYS notes OAG questioned this statement within their review of our 2023 comment letter. Yet, OAG acknowledged in its OAG Staff Report that some commodities are more likely to experience frequent fluctuations in price, like highly-weather dependent crops, and do at times experience price fluctuations above 10% due to its “vulnerabl(ility) to weather-related disruptions”(OAG Staff Report, pg.35) and “thus will frequently experience abnormal market disruptions as the statute defines that term.” This price fluctuation is not extreme but due to market conditions like supply and demand and factors that impact production. All this proves is that a 10% price fluctuation can be a normal response to an abnormal market disruption that directly impacts the production of a commodity, rather than price gouging.

Is a change in price due to market fluctuations “*unconscionably excessive*?” Absolutely not. Basic economics tell us prices increase because there is high demand and low supply. But also, going back to earlier points about the absolute necessity for the rules to create a process for declaration of an abnormal disruption of the market, how is one to know when there is a major drought in Australia (OAG Staff Report, pg. 36) or a severe drought is occurring somewhere halfway around the world which would trigger this statute and proposed rules? How does someone know which specific goods are included? Or when the disruption ends?

OAG points to 10% as the standard in other States, including neighboring New Jersey, and New York City, but ignores that these jurisdictions’ laws prohibit merely “excessive” price increases, not “*unconscionably excessive*.” OAG disregards states with more analogous laws to New York (e.g., Pennsylvania, Michigan, and Minnesota) that employ a 20% threshold. Together with the other uncertainties regarding the statute’s applicability, we believe that the 10% price threshold is inconsistent with the statute’s intentions and too rigid a standard.

➤ **Additional Concerns**

- While we appreciate the inclusion of certain affirmative defenses which were not present in the 2023 proposed rules, OAG has not acknowledged other factors which may lead to increased prices, such as legislative or regulatory actions by the State which directly impact pricing. All new labor mandates or health care insurance coverage mandates have a cost which leads to higher operating expenses and impacts the costs of goods and services. Unemployment insurance, additional taxes, property taxes, regulatory mandates that incur costs, liability insurance, workers’ compensation insurance, and increased health insurance costs all impact a business’s ability to operate. If they cannot adjust prices to offset those costs, they will likely go out of business.
- While the proposed regulation limits applicability to sales in New York or to consumers and New York, and states that it should not be “read to conflict with the Dormant Commerce Clause,” it does contemplate out of state prices (§600.9(c)). Therefore, it is highly likely that extraterritorial transactions are indirectly regulated. The addition of “new essential products” introduces more ambiguity and affords broad discretion to compare prices of products as OAG determines are “comparable” products or be able to dictate whether the launch price of a new product is “unconscionably extreme, or there was an exercise of unfair leverage or unconscionable means, or a combination of both” (§600.7). This standard is vague. It would disincentivize innovation across the board, perhaps at times that they are most needed.

- Further, “Excluded Costs and Profit Margin Maintenance Defense” is defined as “the seller’s gross income per unit minus statutory costs per unit” (§ 600.8(g)). Customarily, “margin of profit” is expressed as a percentage which indicates the proportion of revenue remaining as profit, however, clarification that it in fact is the maintenance of the rate rather than a dollar amount would be appreciated. Further, the rules fail to provide clarity around circumstances involving “benchmark price.” What if a business has a promotion that lasts longer than 30 days? While there is some language in the proposed rules that allow businesses to adjust the rate within 30 days of the sale price, there is no acknowledgement or clarity on how to treat prices if that sale or promotion is longer than 30 days.

In summary, without clear rules, entrepreneurs and businesses of all sizes will have little if any advanced notice of applicability of GBL § 396-r, and may be deterred from doing business, or taking advantage of business opportunities, in New York. That outcome would adversely impact New Yorkers through the loss of access to goods and services, including innovative products and services during times of heightened consumer need. Our economic performance and future growth are dependent on businesses operating within clear guidelines and knowing the rules. Yet, when the proposed rules were published, our members were left questioning how they could successfully operate since the rules did not clearly outline the parameters of lawful versus illegal market actions. BCNYS believes that the above concerns should be addressed in OAG’s final rulemaking to ensure all businesses, consumers and regulators know and understand the rules and can comply without significant uncertainty, and to avoid effectuating price caps on practically all goods and services which will irreparably harm New York’s economy and jobs.

Thank you for your consideration of BCNYS’s comments on the proposed price-gouging rules. We welcome the opportunity to further speak with you to ensure that the final rules provide clear guiderails for New York’s business community. Please do not hesitate to contact me by email at chelsea.lemon@bcnys.org or by phone at (518) 694-4462 with any questions.

Sincerely,



Chelsea Lemon
Director of Government Affairs
The Business Council of New- York State
Chelsea.lemon@bcnys.org | 518-694-4462



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April 11, 2025

Honorable Letitia James
Attorney General of the State of New York
Office of the Attorney General
State Capitol
Albany, New York 12224

Comment on behalf of the National Federation of Independent Business (NFIB) Regarding Proposed Rulemaking on Price Gouging

NFIB is a member-driven organization representing nearly 300,000 small businesses across this country and more than 11,000 across New York State. There are close to 500,000 small businesses with employees in New York. These businesses employ 40 percent of the state's private-sector workforce, over 3 million New Yorkers, and their production accounts for nearly half of the state's GDP. A staggering 98 percent of New York's businesses have fewer than 100 employees. A strong, vibrant small business eco-system supports local tax bases, governments, and schools.

It is well established that small businesses are local job creators and the bedrock of state and regional economies. These neighborhood employers still face unprecedented challenges post pandemic, including persistent inflation, market volatility, supply chain interruptions, and other unpredictable economic-related conditions outside of their control. This environment has made it more difficult to set consistent prices, with prices frequently adjusted by significant margins given the fluctuating costs of goods from vendors and suppliers. At the end of the day, small business owners need to make a profit to ensure their business survives. This requires being able to react quickly to any market condition and set prices in real

time. Unfortunately, the proposed price gouging rule is overly broad, lacks clarity, and does not consider the challenging national and global supply chain landscape.

While NFIB appreciates that the rule is also intended to protect small businesses from price gouging and prohibit large corporations with large market shares from dramatically increasing their profit margins at the expense of small business, at the same time, this proposed rule can have detrimental effects on small business owners, including a convenience store, retailer, independent grocer or pharmacy, building material supplier, or other entity, especially since there are numerous circumstances in which price gouging could be investigated. The rule defines “abnormal disruption of the market” as “any change in the market, whether actual or imminently threatened, resulting from a triggering event.” Triggering event is defined as “one or more of (i) stress of weather, (ii) convulsion of nature, (iii) failure or shortage of electric power or other source of energy, (iv) strike, (v) civil disorder, (vi) war, (vi) military action, (vii) national or local emergency, (viii) drug shortage, or (ix) other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the Governor.” As defined, there are countless times throughout the year that could be considered a “triggering event” meaning small businesses pricing practices will be under increased scrutiny. How will a small business owner know that there is a triggering event? What sort of communication will small business owners receive to notify them of such determination? Are disruptions in other states or across the globe considered trigger events? If so, it is not unreasonable to suspect that there will always be “abnormal disruptions of the market.” There are far too many circumstances in which the state of New York declares a state of emergency, oftentimes unknown to small businesses and consumers alike. The list of potential triggering events is too vast and too vague and must be better defined and limited in scope.

Additionally, there must be clear notice requirements, where the onus is on state and local governments to notify small businesses owners of potential triggering events with a chronological time limitation. How long will the rule be in effect? Leaving an open-ended timeframe creates greater uncertainty and difficulty in adjusting prices based on other factors.

During a disruption, the rule narrowly limits business owners’ abilities to increase prices without fear of investigation or providing proof that a price increase above 10 percent is warranted. According to the proposed rule, “the sale of an essential product at a price that is greater than 10 percent of that essential product’s pre-disruption price represents a gross disparity in price for purposes of General Business Law § 396-r(3)(b)(i).” Again, in this volatile market, businesses have seen dramatic price swings, often greater than 10 percent. In a hyper inflationary

environment, and even normal economic times, 10 percent is an incredibly low threshold to be used as a “gross disparity,” and should be reconsidered.

The proposed rule also needs a clearer definition of “relevant market” as it relates to determining a business’s market share. While NFIB understands this is an attempt to reign in antitrust practices, there is no reasonable way for a small business owner to determine their market share in a “relevant market.” A small business owner may own more than one hardware store or convenience store, and in certain parts of New York, particularly rural areas, there is naturally a limited number of businesses. In this case, would that small business owner be considered market dominant? The term “relevant market” needs more clarity and a much narrower definition to ensure small businesses are not captured and do not need to determine their market share.

Given the scope of this proposed rule, NFIB has significant concerns about the impact it will have on Main Street’s ability to set pricing without fear of complaint and investigation, especially as the raw cost of goods is only one component of price setting. The rule does not take into account that a variety of factors go into price determinations, including wage increases (i.e. minimum wage increase), state and local taxes (i.e. congestion pricing, property tax increases, MTA payroll tax increase, Unemployment Insurance tax hikes, etc.), utility prices, additional mandates that require businesses to incur regulatory compliance costs, insurance premium increases, new equipment purchases, and more. Oftentimes, small businesses have no control over these increased costs, or when the costs will hit their bottom line, and will need to adjust accordingly. The rule must take this into consideration without placing the burden on small businesses owners to prove they are not “price gouging.”

With a great deal of uncertainty, escalating costs, labor shortages, and additional price hikes, small businesses simply cannot begin to navigate the complexity of this proposed rule, nor can they afford to be accused of price gouging or alternatively limit their ability to make a profit. NFIB respectfully requests the Attorney General’s office to consider our comments on behalf of small businesses and looks forward to working together to ensure this proposal is workable and fair.

Thank you for your time and attention.

Advocates of the
Food Industry
Since 1900



FOOD INDUSTRY ALLIANCE OF NEW YORK STATE, INC.

111 Washington Avenue - Suite 200, Albany, NY 12210 (518) 434-1900

April 11, 2025

BY EMAIL – (stopillegalprofiteering@ag.ny.gov)

Honorable Letitia James
Attorney General of the State of New York
Office of the Attorney General
State Capitol
Albany, New York 12224

RE – Proposed Rulemaking Pursuant to New York General Business Law Section 396-r(5) (Price Gouging)

Dear Sir or Madam:

The Food Industry of New York State, Inc. (FIA), the premier trade association representing the full spectrum of the retail food industry in New York, welcomes the opportunity to offer comments in response to the February 2025 proposed rules regarding price gouging. We also appreciate the consideration FIA's comments related to this issue were given during the previous proposed rulemaking in 2023.

Unfortunately, in review of the new proposed rulemaking, many of FIA's concerns expressed in 2023 remain.

Focusing first on the proposed sections **600.4 & 600.3** ("unfair leverage"). As expressed in the 2023 proposed rulemaking, these provisions go beyond consumer protection against price gouging and instead focus on anti-competitive "unfair leverage" behavior, which is not the subject of the proposed rule. Specifically, the concepts of "market power" and "relevant market" are antitrust concepts. Establishing a "relevant market" and "market power" requires extensive expert analysis.

This entire section would unfairly target retailers in some markets while holding some retailers to different standards, all while unduly burdening them to overcome presumptive violations for any price increase of a scrutinized sale, however minimal.

Furthermore, the assessment that this will not increase costs of compliance is blatantly false. The "presumptive" violation provisions offer a very simplistic opportunity to *allege* a prima facie case. If affected retailers have any increase in price it will be a presumed violation, therefore both the agency and the retailer will be required to spend resources on an investigation (where there may be no evidence of an exercise of unfair leverage, but nevertheless the presumption must be disproven) whereas unaffected retailers with similar price increases would not be subject to presumptive violations and thus have no investigation or defense costs.

This will lead to a preponderance of alleged claims, and while the plaintiff would have the burden of proof to come forward with evidence of these allegations during discovery, the seller will have to

prove (1) that the increased price merely “preserves the margin” on the essential product at issue, or (2) the seller actually lacks market power.

These continuous, meritless claims of price gouging will force the entire retail food industry to spend excessively to refute the claims. All with definitions, as already stated, lacking clarity and utilizing concepts not typically utilized in price gouging.

As stated in 2023, this entire section requires more clarity related to “relevant market” and should be modified extensively as it relates to current anti-trust regulations. Further, many aspects of this industry are not wholly incorporated within New York’s boundaries. Most states do not impose these types of disparate presumptions, and they lack justification to be used in New York as well.

In reviewing proposed rule **600.8 (Cost Definition and Allocation Methods)**, FIA recommends the removal of the proposed limitations which prohibits the reliance on external indices as a basis for increased costs. It is problematic that the language continues to fail to recognize the complexities within any given supply chain.

Due to numerous, unforeseen scenarios, all of which are out of the control of retailers, the actual delivery costs may not be available in real time. This requires that prices are continuously adjusted in highly competitive markets in relation to their costs or anticipated costs. To do so and remain competitive, there may be instances when a retailer needs to estimate its delivered product cost and set a price accordingly at the time, even though it has not yet been invoiced for the delivery. In such instances, the retailer may have no other options except to rely on index prices to estimate what its actual delivered cost will be.

Further, with respect to proposed rule **600.6 (Gross Disparities Between Post-Disruption and Pre-Disruption Price)**, our concerns remain from the proposed rulemaking in 2023. The lack of any temporal limitation on the ten percent rule leaves retail sellers susceptible to an automatic presumption of price gouging that may be unwarranted during prolonged periods of pricing restrictions, the COVID public health emergency being an example. Yet another example relates to delivery cost, as we described above with our comments related to proposed rule 600.8.

With respect to the language defining an “**Abnormal Disruption of the Market**”, which is defined as “any change in the market, whether *actual or imminently threatened*, resulting from” two sets of triggering events: (1) “stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, drug shortage”; *or* (2) any cause of an abnormal disruption of the market that results in the Governor declaring a state of emergency.

We acknowledge the additions of “stress of weather,” “convulsion of nature,” and “failure of shortage of electric power or other source of energy” to the possible list of triggering events. That said, we cannot underscore the necessity that all examples provided must be sufficiently defined, and these remain vague.

Additionally, there are numerous instances where sellers may be *unaware* of an abnormal disruption of the market when setting prices. The definition appears vague enough to encompass droughts in other states, diseases such as avian influenza, or even conditions in other countries. Further, the “disruption” need not have even occurred; it can be “imminent.”

Ultimately, the definition should be succinct and left solely to the event in which a national, state or local declaration of emergency has been formally issued by the applicable government authority. This definition is the only means in which the regulated community can be put on clear and consistent notice that a triggering event has occurred.

FIA also has additional concerns as it relates to the **Absence of Chronological Time Limitations**. Other states have regulations that expire after a fixed period (e.g., 30 days after a disaster proclamation; 45 days from “triggering event”, etc.). This regulation does not and creates even more uncertainty about whether there is a “disruption” in effect that limits the ability of sellers to set prices. Any proposed changes to current price gouging laws need to have time limitations set in statute.

Lastly, there are additional items that need to be considered in the proposed rulemaking. Consider the following:

- Is a tariff considered an “abnormal market disruption”? With the current economic environment and the impact global tariffs will be having on numerous products, these must be considered.
- “Profit Margin Maintenance” is defined as the seller’s gross income per unit minus statutory costs per unit. What does this apply to? Rate and Dollars? For example. If a good is purchased by a retailer for \$1.00 and is sold for \$1.50 but then the purchase price for the retailer is increased by .50 cents, can the retailer only increase the cost for sale to a consumer by .50 cents to \$2.00 or maintain the 33% margin rate? This is unclear.
- The definition of “Benchmark Price” also needs clarity, specifically in the instance of a sale item during or at the onset of an abnormal market disruption. Retailers would likely stop the sale price of a good at the onset of a disruption and adjust the rate to the typical rate of sale or if the cost to the retailer increases, by the margin rate as described in our previous point. While the proposed rules discuss that this would be sufficient if it is within 30 days of the sale price, this also could prove to be limiting during times of longer promotions.

Overall, the entire rulemaking fails to recognize the impact of other legislative or regulatory actions by New York and the impact on pricing. If new labor mandates, for example, are enacted which lead to significantly higher costs for a business, which impacts operating costs, this would have an impact on the price of goods. For example, increased minimum wage, taxes, unemployment and health insurance costs, all affect the cost of owning and operating a business in New York. If these costs are increased, is a business restricted from offsetting those costs?

The retail food industry supports sensible, workable solutions to public policy issues, such as this. That said, most of the rules as proposed contain a lack of clarity and equally concerning, a consideration of the national and global nature of the supply chain. The continued vagueness contained throughout the proposed rules will have a significant impact on the industry and will have a direct negative impact on consumers.

We respectfully urge the Department to consider this submission on behalf of the retail food industry in New York prior to publishing any final regulations. FIA remains a willing stakeholder to continue the discussion on price gouging and provide any guidance necessary to improve the rules and promote fair and workable standards on price guidance in New York.

Respectfully submitted,



Michael Durant
President/CEO
Food Industry Alliance of NYS, Inc.



New York Association of Convenience Stores

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April 11, 2025

The Honorable Letitia James
Office of the Attorney General
State Capitol Albany, NY 12224-0341

Dear Attorney General James,

The New York Association of Convenience Stores (NYACS) appreciates the opportunity to submit the following comments on the proposed price gouging regulations, as detailed in the February 12, 2025 State Register. As the representative body for approximately 8,000 convenience stores employing in excess of 127,000 individuals across New York, NYACS steadfastly supports initiatives designed to shield consumers from predatory pricing during emergency situations. However, several elements of the proposed framework, including the fixed 10% price increase limit, the lack of clarity in the market share provision, and the current gap in defining safe harbors for responsible retailers, present operational and interpretive challenges that require careful reconsideration for retailers throughout the state. NYACS has previously responded to requests for comment through this process in 2022 and in 2023.

The proposed regulations establish a 10% threshold on price adjustments above the baseline cost of goods or services in the 30 days prior to a market disruption. These incredibly tight limitations on cost increases do not adequately reflect the legitimate cost increases retailers encounter during crises. For instance, extreme weather conditions may necessitate higher expenditures on overtime labor, hazard compensation, and logistical challenges, all of which inevitably affect pricing to consumers. This concern was previously articulated in our 2023 submission and remains unaddressed. We respectfully request the adoption of an adaptable pricing model, underpinned by a robust, evidence-based cost-justification process, to more accurately reflect the economic realities faced by retailers.

As we stated in our comments dated April 22, 2022, and again in our comments dated May 15, 2023, retail motor fuel prices are affected by dozens of factors that are constantly shifting, that retailers have little to no control over. Factors that influence gas prices include crude oil prices, local sales taxes, credit card swipe fees, delivery and labor costs, weather, military disputes, and global supply chain disruptions. Convenience store operators are also buyers of fuel as much as they are sellers, so they are sensitive to how consumers are impacted by price trends. The difference is that convenience stores buy fuel thousands of gallons at a time.

The introduction of an “unfair leverage” baseline for entities holding more than 30% of the market share prior to a disruption is vague and leaves too much room for interpretation in an already confusing situation. Convenience stores are, in many rural and underserved areas of the state, the only grocery or essential goods retailer; a circumstance driven by geographic and economic constraints rather than market dominance. Retailers who are the lone operators in food deserts should not be forced into a position that could be construed as exploitative, given the store’s vital community role. This issue was raised in our comments dated May 15, 2023, where we underscored the potential for unjust penalization of small, community-focused retailers lacking local competition. We propose that the final regulation include a rigorous, quantifiable definition of “market share,” accompanied by a clear exemption for situations where limited competition arises from regional isolation or other outside factors.

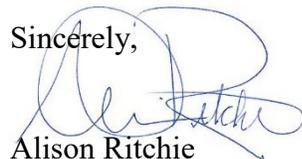
As highlighted in our 2023 comments, the absence of clear safe harbors continue to pose a significant challenge. Convenience store operators often make pricing determinations under rapidly shifting emergency conditions. The establishment of a well-defined good-faith pricing exemption, supported by explicit standards, would afford small businesses the assurance to act prudently without the threat of unintentional non-compliance. This measure would provide essential safeguards for retailers exercising due diligence amid crisis scenarios.

NYACS appreciates your office’s intention to more clearly address price gouging in the state, however it is frustrating that our previous comments have not been considered. As such, NYACS requests that your office undertake a thorough review and adjustment of these provisions to prevent the unintended imposition of undue hardship on retailers operating in good faith under exigent circumstances. We specifically recommend:

- Adding a flexible adjustment to the 10% price increase threshold, adjusted to reflect outside cost factors during emergencies;
- Establishing a more clearly defined use of the term “market share” to safeguard critical retailers in underserved regions; and
- Integrating explicit safe harbor provisions to protect retailers adhering to ethical practices in response to crisis conditions.

We are grateful for your consideration of these comments, encompassing both our current submission and prior input from 2023, and we stand prepared to engage constructively in developing a regulatory approach that harmonizes consumer protection with the operational needs of essential businesses.

Sincerely,



Alison Ritchie

President

New York Association of Convenience Stores



April 14, 2025

**Comments of Nelson Eusebio
Director of Government Affairs
National Supermarket Association (NSA)**

Regarding

Price-Gouging Rulemaking

The National Supermarket Association (NSA) is a trade association that represents the interest of independent supermarket owners in New York and other urban cities throughout the East coast, Mid-Atlantic region, and Florida. In the five boroughs alone, we represent over 400 stores that employ over 15,000 New Yorkers. Our members work hard every day to run their businesses, support their families and provide jobs, healthy food, and full service supermarkets to their communities. Most of our members are of Hispanic descent and operate locations in underserved neighborhoods that have been abandoned by large chain stores.

We appreciate the opportunity to provide comments on the proposed price gouging rules and the NSA fully supports the rules intent—to protect consumers from unjustifiable price increases during times of crisis. We also recognize and value the Attorney General’s efforts to consider our concerns during the initial comment period and incorporate them into the revised rules. However, we believe that the retail sector, particularly independent supermarkets, is the wrong target for these regulations. Instead, price gouging enforcement should be focused further up the supply chain, specifically on distributors and wholesalers who dictate the costs at which retailers must purchase goods.

Independent supermarkets play a critical role in ensuring that essential products remain available to the communities we serve, particularly in times of crisis. However, retailers are not in control of the wholesale pricing of goods. When disruptions occur due to factors such as natural disasters, supply chain breakdowns, or national emergencies, supermarkets often face higher costs imposed by suppliers and distributors. Independent supermarket owners are not in the best position to bear the burden of proving the affirmative defenses provided under the proposed rules. Such small businesses themselves suffer to survive in times of crises and, if

required to take on the obligation of legal proceedings to defend prices imposed on them by others, they may simply refrain from selling essential products at all during times of crisis. The risks of selling “essential products” will simply outweigh the normal profit margins they will be required to maintain, leaving citizens with an even lesser supply of essential goods.

Additionally, the rule lacks specificity regarding what constitutes an “unconscionably extreme” price. This ambiguity leaves room for inconsistent enforcement and potential punitive action against supermarkets that are merely responding to market conditions beyond their control. This definition should be clarified to provide retailers with clear, practical guidelines.

To truly uphold the spirit of these regulations and protect both consumers and small businesses, we strongly urge the Attorney General’s office to adopt a more balanced and effective approach. We appreciate your attention to this matter and welcome the opportunity to work with the office to ensure that price gouging protections are fair, effective, and properly targeted. Thank you for your consideration of our comments.



April 11, 2025

Sent via electronic mail to stopillegalprofiteering@ag.ny.gov

Hon. Letitia James
Attorney General of the State of New York
Office of the Attorney General
State Capitol
Albany, New York 12224

Re: Proposed Rulemaking Pursuant to N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)

A. Background on the Consumer Brands Association

The Consumer Brands Association (“Consumer Brands”) champions the industry whose products Americans depend on every day, representing more than 1,700 iconic brands, including household, personal care, food, and beverage products manufactured by the consumer packaged goods (“CPG”) industry. As a provider of a variety of essential goods to consumers and accounting for one-fifth of all freight shipping in the United States, Consumer Brands is a vital stakeholder and expert on the supply chain ecosystem, with members that work to remove barriers in providing American consumers the affordable products they rely on every day. The CPG industry powers every day for the U.S. economy. The industry is responsible for 1 in 10 American jobs, contributing \$2.5 trillion to the nation’s GDP.¹ In New York alone, the CPG industry supports a total of 987,000 jobs and labor income of \$7.2 billion, and it adds \$139 billion in contribution to the State’s GDP.²

Consumer Brands appreciates the opportunity to submit a comment in response to the February 12, 2025, Notice of Proposed Rulemaking Regarding Price-Gouging³ (hereinafter the “Proposed Rule”), and thanks the Attorney General for considering Consumer Brands’ April 15, 2022 and May 22, 2023 comments to prior proposed rulemakings. In the prior comments, Consumer Brands highlighted the role of the CPG industry and some of the unprecedented challenges faced by the CPG industry during a pandemic. In this comment, we raise and reiterate concern about several elements of the Proposed Rule, including business and logistical challenges of implementation of the rule, and unintended and harmful consequences that could negatively impact New Yorkers and impede the State’s ability to compete for and retain businesses in the State.

B. The Proposed Rulemaking Exceeds Statutory Authority

¹ Consumer Brands Association, *The Economic Contributions of the U.S. Consumer Packaged Goods Industry*, <https://consumerbrandsassociation.org/wp-content/uploads/2024/12/national.pdf>.

² Consumer Brands Association, *State Spotlight: New York*, <https://consumerbrandsassociation.org/wp-content/uploads/pdfs/state-pdfs/new-york.pdf>; see also Consumer Brands Association, *Economic Contribution of the U.S. Consumer Packaged Goods Industry* (Oct. 2024), <https://consumerbrandsassociation.org/wp-content/uploads/2024/10/CBA-Economic-Contribution-Report-Oct-2024.pdf>.

³ *Notice of Proposed Rulemaking*, I.D. No. LAW-06-25-00005-P – 00012-P, NEW YORK STATE REGISTER, Vol. XLVII Issue 6 (Feb. 12, 2025).



The New York price gouging law was amended in the height of the COVID-19 pandemic to give the Attorney General rulemaking authority. This rulemaking authority was not absolute and is not intended to disrupt the discrete roles of the Executive, Legislative, and Judicial branches. The rulemaking authority only extends to that “necessary to effectuate and enforce” the law.⁴ As a threshold matter, we respectfully submit the proposed rulemaking, as presented, goes far beyond this authority, providing interpretations that should be left to a court. Otherwise, the rulemaking would be counter to the State non-delegation doctrine.

C. The Attorney General should take care to establish clearly articulated and balanced presumptions of liability to mitigate the risks of existential and excessively punitive damages.

Consumer Brands remains concerned that the Proposed Rule, as currently drafted, raises significant due process concerns. Specifically, the Proposed Rule’s definitions are vague and overbroad, which creates the potential for inadvertent, inconsistent application and interpretation. Inconsistent application and interpretation will only lead to confusion among the business community—not compliance, which does not benefit New York consumers. We further voice concerns over the extreme penalties involved with potential enforcement of these proposed rules, namely (i) the greater of up to \$25,000 per violation or three times the “gross receipts for the relevant goods or services” and (ii) restitution sanctions.⁵ This treble damages provision is especially problematic when combined with the arbitrary, low, and ambiguous thresholds for presumptive price gouging and the Proposed Rule’s definitions of costs.

1. An Overbroad Presumption of Unfair Leverage from a Market Position Could Unintentionally Impact the Availability of Essential Goods to New Yorkers.

Consumer Brands is supportive of predictable standards that do not arbitrarily trigger a presumption of “price gouging.” Especially with respect to presumptions of liability, the Proposed Rule should be carefully balanced to deter improper conduct without excessively chilling practices that benefit New York consumers. However, the presumption of unfair leverage based on thresholds created by Section 600.4 of the Proposed Rule may be improperly calibrated and could improperly impact markets in several unintended ways.⁶

First, the Proposed Rule appears to presume that sellers track their respective product-level market shares in a manner that enables compliance. This is not necessarily the case. Most small manufacturers, distributors, and retailers—especially online and brick-and-mortar retailers operating in rural areas—do not have a reliable means of measuring market concentration and their share of a “relevant market.” Even for those sellers with access to share information, determination of relevant antitrust markets relies on sophisticated and resource-intensive economic and legal

⁴ See G.B.L. § 396-r(5); See also [N.Y.S. Assembly Bill A10270](#) (Apr. 8, 2020)

⁵ See G.B.L. § 396-r(4).

⁶ See *Notice of Proposed Rulemaking, Section 600.4: Unfair Leverage of Market Position*, LAW-06-25-00006-P (Feb. 12, 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.4-unfair-leverage-market-position.pdf>. As written, any increase in the price charged for an essential product is presumed to result from a seller’s exercise of “unfair leverage” if the Seller (i) has a market share greater than 30% in a relevant market for that essential product or (ii) has a market share greater than 10% and operates in a relevant market with a Herfindahl-Hirschman Index (HHI) of 1,800 or more. *Id.*



analyses, which retailers may not have the resources or incentive to perform. In any event, because any one product may compete in several valid but overlapping “markets,” even sophisticated merchants cannot predict how the Attorney General would define the relevant market for regulatory purposes. As a result, if the Proposed Rule is implemented as written, many sellers will be operating blind, unable to assess whether their market position will trigger a presumption of price gouging from even a *de minimis* increase in price. We therefore urge the Attorney General to reconsider the administrability of a rule that requires market definition.

Second, the Proposed Rule’s market share thresholds do not appear to be properly calibrated. The U.S. Department of Justice and Federal Trade Commission’s 2023 Merger Guidelines’ market share and market concentration thresholds upon which the Attorney General relied in setting Section 600.4’s presumptions are utilized by the Federal antitrust agencies to evaluate mergers and acquisitions for their likely effect on competition under Section 7 of the Clayton Act.⁷ These thresholds are intended to detect concentration in its incipiency and are inherently forward-looking.⁸ By contrast, Federal agencies and courts typically require *far higher* market shares and levels of market concentration to infer market power in antitrust conduct cases.⁹ As Section 600.4 is concerned with assessing actual conduct, as opposed to the likely effect of future market concentration, we urge the Attorney General to reconsider whether alternative market share and market concentration thresholds would be appropriate.

Indeed, carefully calibrated thresholds are especially important because the potential harm from overly strict enforcement thresholds will not singularly fall on large businesses. For example, in rural communities, where geographic antitrust markets are often narrowly drawn, and retail outlets are fewer, many small and local businesses will likely be inadvertently captured under the Proposed Rule’s market concentration and market share thresholds. We specifically encourage the Attorney General to reassess the Proposed Rule’s market concentration thresholds for their likely effects on small businesses and rural communities.

Third, the Proposed Rule’s standard for rebutting an inference of unfair leverage may overly deter lawful pricing practices to the ultimate detriment of New York consumers. Faced with uncertain

⁷ *Id.* at 19-20 (citing the 2023 Merger Guidelines for the proposition that, because a market with an HHI of 1,800 or more is “highly concentrated,” it is appropriate to “presume exercise of unfair leverage for any seller in such a market with at least 10% market share when the Seller raises prices during an abnormal market disruption.”). *But see* U.S. Department of Justice and the Federal Trade Commission, *2023 Merger Guidelines* (Dec. 18, 2023) (“Section 7 was designed to arrest anticompetitive tendencies in their *incipiency* . . . To show that a merger is unlawful, a plaintiff need only prove that its effect ‘*may be* substantially to lessen competition’ or to tend to create a monopoly.”)

⁸ The Regulatory Impact Statement itself recognizes that the 30% market share threshold for presuming unfair leverage derived from *United States v. Philadelphia National Bank*. *See Regulatory Impact Statement*, LAW-06-25-00006-P at 21-22 (citing 374 U.S. 321 (1963)). However, this presumption was intended as a heuristic for “prediction of [a merger’s] impact upon *competitive conditions in the future*” so that potentially anticompetitive concentrations are detected in their “*incipiency*,” not a tool for assessing a market’s current concentration. *Philadelphia National Bank*, 374 U.S. at 362.

⁹ *See, e.g., Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (noting that “numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power”); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (While “we have held that a market share of over 70 percent is usually ‘strong evidence’ of monopoly power, . . . market share below 50% is rarely evidence of monopoly power.”) (citing *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 129 (2d Cir. 1981)).



market definitions and unduly low presumptions of price gouging, the Proposed Rule presents sellers with a Sophie's choice: pass on disruption-related costs and risk unknown legal jeopardy or absorb losses. Forcing sellers into this position presents several unintended and potentially harmful consequences to New Yorkers. For example, the Proposed Rule may incentivize manufacturers and distributors to shift goods to other markets where there is no presumption of price gouging based on market concentration/market share thresholds during market disruptions. Alternatively, the Proposed Rule could encourage firms impacted by the market concentration/market share thresholds to charge higher prices in non-emergency times knowing that they will be unable to adjust prices to offset losses sustained during a disruption or cost spikes without facing potential liability triggered by the low presumptive threshold contemplated by the Proposed Rule. These unintended consequences could lead to higher prices—exacerbating current inflation concerns—and impact the availability of essential goods to New Yorkers, both in emergency and non-emergency times.

2. An Overbroad Application of a Presumption of Price Gouging Could Likewise Impact the Availability of Essential Goods to New Yorkers.

CPG companies must be able to properly meet consumer demand, even in times where supply challenges may arise. The Proposed Rule applies during “abnormal disruptions in the market,” when response times are short, demand is high, and supply chains are strained.¹⁰ Consumer Brands remains concerned that, rather than empowering CPG companies to respond to dynamic fluctuations in supply and demand, the Proposed Rule’s 10% Gross Disparity presumption is miscalibrated and could impact markets in several unintended ways.¹¹

Abnormal disruptions in the marketplace are inherently unexpected and require swift but reasonable responses to unpredictable situations. In circumstances where input costs rapidly increase—as may be the case with the Trump Administration’s recently announced tariffs, which are expected to increase some commodity prices by at least 10%¹²—the Proposed Rule could

¹⁰ See N.Y. Gen. Bus. Law § 396-r(2) (defining “abnormal disruption of the market” as “any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.”).

¹¹ Section 600.6 of the Proposed Rule authorizes a finding of liability from evidence an essential product was sold at a price 10% more than its pre-disruption level unless the Seller can show the disparity in price was necessary to preserve its profit margin or recover additional costs not within its control. See *Notice of Proposed Rulemaking, Section 600.6. Gross Disparity Threshold*, LAW-06-25-000010-P, 4 (Feb. 12, 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.6-gross-disparity-threshold.pdf>.

¹² See, e.g., Lori Ann LaRocco, *Nowhere to absorb it’: From consumer small business to big food CEOs, Trump tariff costs will hit wallets*, CNBC (Apr. 1, 2025), <https://www.cnbc.com/2025/04/01/trump-liberation-day-tariffs-consumer-food-cost-price-warning.html>; Jonathan Limehouse, *What grocery items may cost more due to Trump’s tariffs? Seafood, coffee, olive oil, more*, USA TODAY (April 5, 2025), <https://www.usatoday.com/story/money/2025/04/05/groceries-price-increase-trump-tariffs/82953625007/>; *United States - Producer Price Index by Commodity: Pulp, Paper, and Allied Products*, TRADING ECONOMICS (April 5, 2025), <https://tradingeconomics.com/united-states/producer-price-index-by-commodity-for-pulp-paper-and-allied-products-sanitary-tissue-paper-products-made-from-purchased-materials-fed-data.html> (showing increasing cost in paper pulp commodities—a major input for personal care and household cleaning products).



incentivize manufacturers and distributors to shift limited goods to other markets where there is no presumption of price gouging. Alternatively, the Proposed Rule could encourage firms to preemptively charge higher prices to avoid triggering the low presumptive price gouging threshold.

Consumer Brands is further concerned that a Seller’s burden of rebuttal under Section 600.6 will be insurmountable for many law-abiding businesses. A margin-based test for liability presupposes that CPG companies have perfect knowledge of their current and future costs. This is not so. Especially in periods of abnormal disruption—as demonstrated by the COVID-19 pandemic—costs can vary significantly and unpredictably, such that sellers typically do not know their actual all-in costs at the time of sale. Consequently, the Proposed Rule’s margin-based test risks penalizing CPG companies who, in good faith, set a price intended to comply with the law but inadvertently overestimate their expected costs even by a *de minimis* amount. In this way, the Proposed Rule could unintentionally incentivize sellers in an emergency situation to defray costs by cutting back output, thereby potentially reducing supply and increasing prices. Consumer Brands urges the Attorney General to reconsider whether merchants acting in good faith to comply with the law should be subject to liability.

D. The Proposed Narrow Definition of “Costs” Under Section 600.8 Does Not Account For Business Realities.

In Consumer Brands’ responses to prior proposed rulemakings, we expressed concern that the previously proposed definition of “costs” under Section 500.2 was contrary to the Attorney General’s stated goal of ensuring “none of the proposed rules limit any firm from maintaining the per-unit profit margin it had prior to the market disruption, even where that means increasing prices to account for higher costs.” We have the same concerns regarding the new definitions under Section 600.8.¹³

Under General Business Law § 396-r(3)(c), price increases due to “costs not within the control of the defendant” provide an affirmative defense to a prima facie case of price gouging brought under the statute. Yet, Section 600.8 continues to define these “costs” in a way that ignores business realities, supply chain dynamics, and existing customer pricing mechanisms and contracts. These business realities may be rooted in improving sustainability, manufacturing and other operational practices. Consider, as an example, if a CPG manufacturer seeks to increase the proportion of post-consumer recycled plastic in packaging from 40% to 60%, or to switch from an overseas supplier to a domestic supplier with better labor practices; these will have clear implications for cost. Yet section 600.8’s definition of costs and disregard of these realities, will require companies to rethink how they perform their internal accounting, which may be in tension with the Proposed Rule’s newly created standards of “costs.” And, if faced with an investigation, businesses may be forced to undertake costly accounting analyses to comport their ordinary course accounting with Section 600.8’s framework. Given the low margins on which they operate, CPG businesses may be forced to pass through these compliance costs to New York consumers.

¹³ See Notice of Proposed Rulemaking, Section 600.8. Cost Definition and Allocation Methods, LAW-06-25-000012—P, 5 (Feb. 12, 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.6-gross-disparity-threshold.pdf>.



Further, the proposed definition of “costs not within the control of the defendant” fails to account for key costs during emergencies. As the experience of the COVID emergency demonstrated, marketplace disruptions often entail unforeseen costs associated with regulatory compliance (e.g., social distancing in factories, implementing COVID protocols, etc.), evolving consumer requirements (e.g., costs incurred moving to online grocery shopping and delivery), and changing market demand (e.g., costs associated with retooling production and restocking shelves to meet demand for a different assortment of products). As written, it is unclear whether these overhead costs would fall under the Proposed Rule’s narrow definition of “necessary,” leaving businesses to bear the full cost of uncertainty and further compounding compliance costs.

The Proposed Rule also perpetuates numerous practical challenges for businesses seeking to understand the State’s interpretation of these “costs.” Consumer Brands encourages the Attorney General to reconsider its approach to the following:

- *The Proposed Rule should incorporate fundamental and sensible accounting practices.* In response to comments from Consumer Brands, as well as myriad other commentators, the Attorney General observes that an ideal cost rule would accommodate commonplace Generally Accepted Accounting Practices (GAAP) and asserts that assessing costs in accordance with prevailing accounting norms would be impermissible given the statutory language.¹⁴ We disagree. It is wholly possible to assess only those costs “imposed on a seller” “not within [their] control” within GAAP frameworks, and, in any event, we question this narrow statutory interpretation.
- *Apportionment of “costs” only to the challenged product ignores the commercial realities of running a business.* As detailed above, emergency scenarios exacerbate the difficulties inherent in calculating shared internal costs applicable to multiple products. Any proposed definition must account for unforeseen marketplace disruptions and endow sellers with the flexibility to respond.
- *Time period restrictions for calculating “costs” ignore the realities of commercial sourcing and manufacturing.* Any proposed rule must account for the actual costs of manufacturing, including pre-disruption marketplace dynamics, such as component shortages or delays due to labor shortages. Moreover, the “costs” may not reflect the fixed and variable prices of product inputs, which are often based on existing contracts.

Finally, the Proposed Rule’s “cost” definition imposes new administrative burdens. We encourage the Attorney General to further evaluate how the rules would impose new obligations on companies in defining their “costs” for purposes of compliance.

E. The Definition of “Chain of Distribution” Under Section 600.9 Raises Constitutional Concerns.

Section 600.9 subjects all parties within the “chain of distribution, including manufacturers, suppliers, wholesalers, distributors, or retail sellers of goods,” to potential sanctions related to

¹⁴ *Id.* at 19 (“Such a rule is not possible given the statutory text, which as described in part 2 of this RIS limits the costs that may be passed on through price increases (“statutory costs”) to costs that are “additional,” “imposed on” a seller, “not within the control of the defendant” Seller and “for the goods and services.”)



goods sold in the State.¹⁵ This is especially concerning if the manufacturer producing such goods has limited, if any, control over where the product is offered for sale and the price to the consumer. Further it misaligns with the reality of how antitrust laws are designed; indeed, such laws are contrary to the manufacturer being overly involved in retail pricing. We again encourage the Attorney General to consider that the extraterritorial application of the Proposed Rules may present significant constitutional issues, including Dormant Commerce Clause and due process concerns.¹⁶

F. Conclusion

While Consumer Brands is fully supportive of consumer protection and clear guidance on price gouging, we remain concerned that the Proposed Rule's overbreadth and vagueness of definitions will have unintended impacts on the marketplace and create unintended consequences that could impact New Yorkers. We urge the New York Attorney General to reconsider these definitions and their impact.

On behalf of Consumer Brands, we thank you for your ongoing efforts to protect New York consumers and ensure they can obtain the products they depend on every day. We stand ready to confer with the Attorney General's office to provide further context to the comments above, particularly about the practical consequences the Proposed Rule would have on our member companies' business operations and ability to provide New Yorkers products of consistent volume and quality during emergency conditions.

Respectfully submitted,

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¹⁵ See *Notice of Proposed Rulemaking, Section 600. Geographic Scope*, LAW-06-25-000011—P, 5 (Feb. 12, 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.6-gross-disparity-threshold.pdf>.

¹⁶ See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582, (1986) (striking down a New York law under the Dormant Commerce Clause when it unconstitutionally regulated out-of-state transactions); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring minimum contacts with the forum for personal jurisdiction).

April 14, 2025

The Honorable Letitia James
Attorney General
State of New York
The Capitol
Albany, NY 12224-0341

Re: Notices of Proposed Rulemaking, Proposed Rules 600.1 and 600.9

Dear Attorney General James:

The Association for Accessible Medicines (“AAM”) submits this comment in response to the Notice of Proposed Rulemaking issued on February 12, 2025, addressing the geographic scope of New York’s price-gouging statute. *See* Notice of Proposed Rulemaking, *Price Gouging: Notice of Proposed Rulemaking, Proposed Rule 600.9, Geographic Scope* (Feb. 2025).¹ AAM must oppose Proposed Rule 600.9 because it exceeds the Attorney General’s authority under New York’s price-gouging statute, and it is unconstitutional. I lay out the legal deficiencies of Proposed Rule 600.9 in more detail below.

Certain definitions proposed to be added in Proposed Rule 600.1 exacerbate the problem that Proposed Rule 600.9 creates. Because the Attorney General has structured this effort as separate rulemakings, for completeness, this letter also responds to the relevant portions of *Proposed Rules 600.1, 600.2, and 600.10, Definitions and Severability*. Except as otherwise noted, however, all references to the Notice of Proposed Rulemaking (“NPRM”) are to the NPRM for Proposed Rule 600.9.

AAM is the leading trade association for manufacturers of generic and biosimilar prescription medicines. AAM’s core mission is to improve the lives of patients by advancing timely access to affordable generic and biosimilar medicines. By bringing lower-cost generic and biosimilar alternatives to market, AAM’s members are reducing the cost of care for patients and the entire health-care system. AAM not only supports the goal of lower drug prices, it works to make that goal a reality.

¹ <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.9-geography.pdf>.

The Honorable Letitia James
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First, Proposed Rule 600.9 unlawfully attempts to expand the reach of New York’s price-gouging statute, N.Y. Gen. Bus. Law § 396-r, to sales that the Legislature expressly did not regulate. By its terms, the price-gouging statute regulates prices charged in sales made *in or into* New York—*i.e.*, sales between two parties located in New York or sales by an out-of-state party to another located in New York—and then, only if “the product sold was located in the state prior to the sale.” *Id.* § 396-r(2)(e). By contrast, Proposed Rule 600.9 would regulate prices charged in sales that occur entirely *outside* New York, if the goods are “*ultimately* sold to a consumer or end-user in New York.” Proposed Rule 600.9(b)(1) (emphasis added). “Ultimately sold” apparently means a resale into New York by a third party in a separate transaction, potentially many steps down the chain from the transaction that Proposed Rule 600.9 seeks to regulate. That is unlawful. The Attorney General’s authority to promulgate rules to “effectuate and enforce” the price-gouging statute does not authorize rulemaking that re-writes the statute. N.Y. Gen. Bus. Law § 396-r(5).

Proposed Rule 600.9’s regulation of wholly out-of-state sales also would violate the Constitution. The dormant Commerce Clause and the Due Process Clause prohibit States from directly regulating wholly out-of-state transactions. AAM has successfully challenged multiple laws attempting to control the out-of-state pricing decisions of generic and biosimilar manufacturers. In 2017, AAM successfully challenged a Maryland drug-pricing law with this constitutional flaw. *See Ass’n for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1168 (2019). Then, in 2023, AAM obtained a preliminary injunction against a similar Minnesota law. *See Ass’n for Accessible Medicines v. Ellison*, 704 F. Supp. 3d 947 (D. Minn. 2023). In the *Frosh* litigation, AAM not only succeeded in having Maryland’s law enjoined, but it was awarded attorney’s fees and costs for its efforts. *Ass’n for Accessible Medicines v. Frosh*, No. 17-cv-1860, Dkt. 101 (D. Md. Nov. 22, 2019).

AAM also successfully invoked the dormant Commerce Clause to invalidate a New York price-regulation statute which, like Proposed Rule 600.9, did not limit its regulatory reach to transactions in New York. New York’s Opioid Stewardship Act (“OSA”) raised revenue from opioid manufacturers and distributors and threatened to penalize them up to \$1 million if they passed along “any portion” of their share in the price of any product. But the OSA had no geographic limit: any price increase, even outside New York, triggered the penalties. The federal district court agreed with AAM that this violated the dormant Commerce Clause on its face. *Healthcare Distribution All. v. Zucker*, 353 F. Supp. 3d 235, 261-262 (S.D.N.Y. 2018). Although it appealed other aspects of the district court’s decision, New York “elected not to seek reversal of the District Court’s invalidation of the pass-through prohibition.” *Ass’n for Accessible Medicines v. James*, 974 F.3d 216, 218 (2d Cir. 2020).

AAM hopes to avoid litigation here and urges you not to adopt Proposed Rule 600.9 or any variant that exceeds the limits imposed by New York’s price-gouging statute and the Constitution’s limits on States’ power to regulate outside their borders.

AAM recognizes the vital importance to all New Yorkers of maintaining access to affordable drugs, including generic medications. Respectfully, this unlawful rulemaking is not the solution.

BACKGROUND

I. New York’s price-gouging statute

New York’s price-gouging statute prohibits any party within the “chain of distribution” from selling or offering to sell essential goods and services at “an unconscionably excessive price” during an “abnormal disruption of the market” for that good or service:

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

N.Y. Gen. Bus. Law § 396-r(2)(a). The statute elsewhere reaffirms that its prohibition “appl[ies] to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another....” N.Y. Gen. Bus. Law § 396-r(2)(e). But although the statute applies to all *entities* in a supply chain, it clarifies that it does not apply to all *sales* made by those entities; instead, the statute cabins its scope to circumstances “when the product sold was located in the state prior to the sale.” *Id.*

The statute’s regulation applies to prices charged for a range of “goods and services,” including “essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease,” as well as “any other essential goods and services used to promote the health or welfare of the public.” N.Y. Gen. Bus. Law § 396-r(2)(d). An “abnormal disruption of the market” occurs in the market for such goods and services when there is “any change in the market, whether actual or imminently threatened resulting from,” among other things, “[a] drug shortage.” N.Y. Gen. Bus. Law § 396-r(2)(b). A drug shortage exists, in turn, “with respect to any drug or medical product intended for human use” when “such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration.” *Id.* § 396-r(2)(c).²

² The law does not define what constitutes an “unconscionably excessive” price. Instead, it provides that New York courts must determine what constitutes an “unconscionably excessive” price by weighing two “factors”: whether the price is “unconscionably extreme” and/or whether it reflects “an exercise of unfair leverage or unconscionable means.” N.Y. Gen. Bus. Law § 396-r(3)(a).

The law identifies two situations in which a price increase is considered presumptively excessive: (a) when there is a “gross disparity” between the prices the defendant charged before and during the supply

The Attorney General is authorized to bring suit in New York court to enforce the statute. N.Y. Gen. Bus. Law § 396-r(4). Any enforcement action must be brought “within the judicial district in which such violations are alleged to have occurred.” *Id.*³

Finally, the statute authorizes the Attorney General to “promulgate such rules and regulations as are necessary to effectuate and enforce” its prohibition. N.Y. Gen. Bus. Law § 396-r(5).

II. The Proposed Rulemaking

On February 12, 2025, the Attorney General proposed a series of new rules to implement the price-gouging statute. In this rulemaking, the Attorney General has proposed a new rule—Proposed Rule 600.9—that purports to “[c]larify [the] geographic scope of [the] price gouging statute” by defining when a sale (or offer to sell) has a sufficient geographic nexus to New York to satisfy the price-gouging statute’s requirement that “the product sold was located in the state prior to the sale.” N.Y. Gen. Bus. Law § 396-r(2)(e); *see* NPRM at 4.

Most relevant here, Proposed Rule 600.9 provides as to “sales” that “[t]he prohibition of General Business Law § 396-r shall apply to the sale of any essential product by any seller when: ... If the essential product is a good, the good is ultimately sold to a consumer or end-user in New York.” Proposed Rule 600.9(b). Separately, “the *offering* for sale of an essential product by a seller⁴” is subject to regulation “if the offer for sale is made in the State.” Proposed Rule 600.9(a) (emphasis added).⁵

shortage, and (b) when the defendant’s price “grossly exceed[s]” the price at which the same (or similar) product “w[as] readily obtainable in the trade area.” N.Y. Gen. Bus. Law § 396-r(3)(b). A defendant can rebut this presumption with evidence that the price increase preserved its pre-shortage profit margin for the product, or that the defendant is subject to “additional costs” for the product that are “not within the control of the defendant.” *Id.* § 396-r(3)(c). However, this evidence defeats only presumptive liability; a court can still find a price excessive under the two-factor standard in § 396-r(3)(a).

³ A New York court must impose a civil penalty for each violation, of up to “three times the gross receipts for the relevant goods or services” or \$25,000, whichever is larger. N.Y. Gen. Bus. Law § 396-r(4). The court also may order restitution to “aggrieved parties” or enter injunctive relief. *Id.*

⁴ “A ‘seller’ means the party making the scrutinized sale, including any manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services within the chain of distribution for the essential product, or a subsidiary, parent company, affiliate, agent, or representative thereof.” Proposed Rule 600.1(m).

⁵ An offer for sale is “made in the State” if: “(i) the seller provides a means by which the essential product may be purchased or ordered by a person within the State (including via the Internet or by phone order) and (ii) the offer, as viewed by a reasonable person in the buyer’s position, contemplates that the essential product will be delivered within the State either as a direct result of the acceptance of the offer or as an option that may be invoked between the offer and delivery of the essential product to the buyer.” Proposed Rule 600.9(a)(1). Further, an offer for sale that meets the preceding criteria is “made in the State” “even if

ARGUMENT

I. Proposed Rule 600.9 exceeds the regulatory authority of New York’s price-gouging statute.

New York’s price-gouging statute authorizes the Attorney General to “promulgate such rules and regulations as are necessary to effectuate and enforce” the statute. N.Y. Gen. Bus. Law § 396-r(5). Proposed Rule 600.9, however, does not “effectuate” or “enforce” the statute; it seeks to *expand* the statute’s regulatory sweep. The statute applies only to sales *in or into* New York, if the product was located in New York prior to the sale. *Id.* § 396-r(2)(e). Proposed Rule 600.9, independently and in conjunction with definitions in Proposed Rule 600.1, would expand that prohibition to transactions that occur entirely *outside* New York, if the good is eventually resold in New York by a third party in a separate transaction. That is unlawful: “It is well settled law that an administrative regulation cannot supercede, amend, modify or expand a duly enacted statute by a legislative body, since the authority to issue such regulations is conferred by a statute.” *Auburn Hous. Auth. v. Givens*, 821 N.Y.S.2d 839, 840 (Auburn City Ct. 2006).

A. New York’s price-gouging statute regulates only in-state sales.

New York’s price-gouging statute regulates prices charged in certain sales made *in or into* New York. The statute prohibits charging an “unconscionably excessive price” for an essential good or service, and emphasizes that this “prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another.” N.Y. Gen. Bus. Law § 396-r(2)(a), (e). However, while the statute reaches every *entity* in the supply chain, it does not regulate the prices charged in every *sale* by those entities; rather, the statute limits its reach to sales of “goods or services ... sold by one party to another *when the product sold was located in the state prior to the sale.*” N.Y. Gen. Bus. Law § 396-r(2)(e) (emphasis added). For “the sale” to be regulated, it is not enough that it be made by a “part[y] within the chain of distribution”; the “product sold” must have been in New York “prior to the sale” taking place. *Id.* That language clearly restricts the price-gouging statute’s reach to *in-state* sales. Therefore, the sale of a generic drug (for which there is a qualifying shortage) by a Pennsylvania manufacturer to an Ohio wholesale distributor would not be subject to the New York law because the drug was not “located in [New York] prior to the sale.” *Id.*

An out-of-state entity’s sale of a product to *another* out-of-state entity does not fall within the statute’s prohibition just because the product is later resold into New York by a third-party in a separate transaction. Although the price-gouging statute applies to sales by “all parties within the chain of distribution,” N.Y. Gen. Bus. Law § 396-r(2)(e), the statute does not treat the sale by

the means of purchasing the essential product are enabled by a third party, or title to the essential product actually sold is transferred by the seller to third parties outside the State, or one or more persons providing the essential product is situated outside the State at or before the time of delivery of the essential product.” *Id.* 600.9(a)(2) (emphasis added).

one entity in the supply chain as a sale by all other entities. To the contrary, the statute regulates at the level of individual transactions between two parties: the law applies to the “goods or services” of any party in the supply chain that are “sold by one party to another,” *id.* § 396-r(2)(e) (emphasis added)—language that most naturally refers to a specific transaction between a specific buyer and a specific seller. That reading is confirmed by the statute’s use of the definite article “the” to identify the regulated sale (“... when the product sold was located in the state prior to *the sale*” *Id.* (emphasis added)). *E.g., Niz-Chavez v. Garland*, 593 U.S. 155, 165 (2021) (recognizing that “an article coupled with a singular noun (‘the Notice’)” is “a combination that ... suggest[s] a discrete” item); *accord Freedom Tr. 2011-2 v. HSBC Bank USA, N.A.*, 184 N.Y.S.3d 340, 341 (N.Y. App. Div. 1st Dept. 2023) (“‘a promise’ refers to a single promise”). Therefore, the sale between the Pennsylvania manufacturer and the Ohio wholesale distributor would not be subject to the price-gouging statute, even if the drug were later resold into New York—“the product” was not “located in [New York] prior to *the sale*” between the manufacturer and the wholesaler. N.Y. Gen. Bus. Law § 396-r(2)(e) (emphasis added).⁶

A separate provision of the price-gouging statute supports this interpretation. As noted, that statute authorizes the Attorney General to remedy “violation[s]” by filing suit in the New York court located “within the judicial district *in which such violations are alleged to have occurred.*” N.Y. Gen. Bus. Law § 396-r(4) (emphasis added). An event “occurs” where it “come[s] to pass,” “takes place,” or “happens.” Webster’s Third New Int’l Dictionary 1561 (1986). This provision thus takes as a given that the sales or offers to sell that the New York statute regulates (and the Attorney General may bring enforcement actions against) are sufficiently connected to New York to be viewed as “tak[ing] place” or “happen[ing]” there. The sale of a generic drug by a Pennsylvania manufacturer to an Ohio wholesale distributor could hardly be said to have “take[n] place” or “occur[red]” in New York—even if some third party later resells the product into New York.

This reading comports with the “Legislature’s express intention to cover ‘all parties within the chain of distribution’ of essential goods sold to the New York public.” NPRM at 19. Under the interpretation just articulated, every “part[y] within the chain of distribution,” N.Y. Gen. Bus. Law § 396-r(2)(e), is subject to the price-gouging statute for all sales made by that entity in or into New York, such as a “supplier” or “wholesaler” located elsewhere that sells goods in New York to a New York wholesaler or retailer. Achieving the statute’s goal does not require adopting an atextual interpretation that extends the statute’s sweep to sales with *no* connection to New York.

The Attorney General’s own enforcement practices support reading the price-gouging statute to apply only to in-state sales. Every past enforcement action that has resulted in a judicial opinion has involved *in-state* actors and *in-state* sales. *See People v. Chazy Hardware, Inc.*, 675 N.Y.S.2d 770 (N.Y. Sup. Ct. 1998) (applying price-gouging statute to sales of generators by

⁶ Even the *resale* between the Ohio distributor and the third-party in New York would not be covered if the product was located in Ohio at the time of the sale—in that case, it would not have been “located in [New York] *prior to the sale.*” N.Y. Gen. Bus. Law § 396-r(2)(e) (emphasis added).

hardware store in Clinton County, New York); *People ex rel. Vacco v. Beach Boys Equip. Co.*, 709 N.Y.S.2d 729, 730 (N.Y. Sup. Ct. App. 2000) (sale of generators in Watertown, New York area); *People v. Two Wheel Corp.*, 512 N.Y.S.2d 439, 440 (N.Y. Sup. Ct. 1987) (sale of generators in Long Island), *aff'd sub nom. People by Abrams v. Two Wheel Corp.*, 71 N.Y.2d 693 (N.Y. 1988); *State v. Strong Oil Co.*, 433 N.Y.S.2d 345, 348 (N.Y. Sup. Ct. 1980) (sale of heating oil in Long Island); *People v. Wever Petroleum, Inc.*, 827 N.Y.S.2d 813, 814 (N.Y. Sup. Ct. 2006) (“New York corporation in the business of selling retail gasoline” in Rensselaer County, New York); *People v. My Service Center*, 836 N.Y.S.2d 487 (N.Y. Sup. Ct. 2007) (gas station in New Rochelle, New York); *People ex rel. Spitzer v. Dame*, 289 A.D.2d 997, 997 (N.Y. Sup. Ct. App. 2001) (roofing company in New York). AAM is unaware of any case that has applied the New York price-gouging law against wholly out-of-state commerce.

That includes the sole New York case cited in the Notice of Proposed Rulemaking—*People v. Tyson Foods*, Index No. 156457/2022, NYSCEF Doc. No. 45 (Supreme Ct., N.Y. Cnty., Dec. 7, 2022). See NPRM at 18-19 (discussing same). That case involved a motion to quash a subpoena from the Attorney General requesting records in aid of an investigation as to “whether Tyson and others in the supply chain for meat products” violated the price-gouging law. *Tyson Foods* at 2. Tyson did not dispute that it sold its meat products “to New York customers,” *id.* at 3, but sought to quash the subpoena on the theory that its products were not “located in New York prior to their sales” and therefore are not covered by the law. *Id.*; see N.Y. Gen. Bus. Law § 396-r(2)(e). Although the New York trial court rejected Tyson’s invocation of the price-gouging statute’s requirement that a product be located in New York “prior to the sale,” it did *not* hold that the price-gouging law applied to wholly out-of-state sales; it could not have, as there was no dispute that Tyson sold its “meat products . . . to New York retailers.” *Tyson Foods* at 3. Rather, the trial court concluded only that the statute does not require that the product have been *already* “imported into New York” at the time of sale to be regulated. *Id.* at 4.⁷

The New York statute is clear: sales of essential goods or services *in or into New York* are regulated if the product was located in New York prior to the sale; sales that occur entirely *outside* New York are not regulated, even if the good is later resold in a different transaction into New York.

B. Proposed Rule 600.9 exceeds the Attorney General’s statutory authority by regulating wholly out-of-state sales.

Rather than adhere to the limits of the price-gouging statute, Proposed Rule 600.9 seeks to re-write the statute to regulate sales occurring wholly *outside* New York.

⁷ The Appellate Division affirmed, but did not endorse the trial court’s interpretation of the New York law. Rather, it reasoned that the Attorney General’s subpoena was not overbroad because “at this stage . . . the documents sought bear a reasonable relation to the issue of whether [Tyson] or others in the chain of distribution of respondent’s products engaged in price gouging.” *People by James v. Tyson Foods, Inc.*, 191 N.Y.S.3d 640 (App. Div. 1st Dept. 2023).

This scope is clear from the text of Proposed Rule 600.9. It provides that the “sale” of a good “by any seller” is “made in the State”—and therefore subject to regulation—if “the good is *ultimately* sold to a consumer or end-user in New York.” Proposed Rule 600.9(a), (b) (emphasis added). As the use of the passive voice indicates, the Proposed Rule does not subject a “seller” to regulation based only on sales *by that seller* “to a consumer or end-user in New York,” Proposed Rule 600.9(b); instead, it regulates the price charged in a “sale of any essential product by any seller” if “the good is *ultimately* sold to a consumer or end-user in New York,” *id.* (emphasis added)—even if *someone else* resells the good to the in-state consumer. Thus, under Proposed Rule 600.9, the sale of a generic drug at an “unconscionably excessive” price by an *out-of-state* manufacturer to an *out-of-state* wholesale distributor would be regulated if the medicine is resold by the wholesale distributor—or any other entity three, four, or even five steps removed—into New York.

The NPRM confirms this reading. It explains that Proposed Rule 600.9 is being promulgated to “clarif[y] that the statutory requirement that ‘the sale’ concern goods ‘located in the State’ is satisfied *if the ultimate sale of the goods*—that is, the sale that directly affects ‘the public’ in New York—takes place in the State.” NPRM at 19 (emphasis added); *accord id.* (“The regulation is also consistent with the Legislature’s intent to expand liability to all parties in the chain of distribution—wherever located—who cause unlawful increases in the prices that New York consumers must pay for necessities during abnormal market disruptions.”).

Some aspects of the definitions in Proposed Rule 600.1 appear to be similarly aimed at expanding the New York law’s scope beyond what the Legislature authorized. For instance, the Attorney General proposes to define an “offer for sale” as a “[s]ale,” Proposed Rule 600.1(k), when the Legislature treated the two distinctly in the statute, N.Y. Gen. Bus. Law § 396-r(2)(a). And the definition of “seller” in Proposed Rule 600.1(m) could be read to support bringing the entire “chain of distribution” within the statute’s scope *even* as to sales made before the goods are ever brought to or sold in or into New York. *See* note 4, *supra*.

The upshot is clear: Proposed Rule 600.9, independently and in conjunction with definitions in Proposed Rule 600.1, exceeds the bounds of the price-gouging statute. The New York statute authorizes the Attorney General to “promulgate such rules and regulations as are necessary to *effectuate and enforce*” the statute. N.Y. Gen. Bus. Law § 396-r(5) (emphasis added). Proposed Rule 600.9 does neither. Instead, it purports to *expand* the statute’s regulatory reach to encompass prices charged in wholly out-of-state sales. That is unlawful. *See Auburn Hous. Auth.*, 821 N.Y.S.2d at 840.

II. Proposed Rule 600.9 violates the Constitution.

Proposed Rule 600.9 not only exceeds the Attorney General’s statutory authority, it is also unconstitutional, because it would directly regulate sales that take place entirely outside New York. The Commerce Clause of the federal Constitution does not allow New York to directly regulate beyond its borders in that way. State action like this has been repeatedly enjoined, with state

officials required to pay attorney’s fees to the challenger, including AAM.

The Constitution provides that “Congress shall have [the] Power ... [t]o regulate Commerce ... among the several States.” Art. I, § 8, cl. 3. The Supreme Court has long interpreted “this language to contain a further, negative command, known as the dormant Commerce Clause,” which prohibits States from legislating in ways that regulate or discriminate against interstate commerce. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

A state law that “directly controls commerce occurring wholly outside the [state’s] boundaries ... is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Frosh*, 887 F.3d at 669 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). This limitation follows from the “inherent limits [on] the State’s power”—“any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States” and therefore “must be held invalid.” *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)). The federal courts have repeatedly applied this prohibition to invalidate state laws that directly regulate conduct outside their borders.⁸

Proposed Rule 600.9 violates this clear constitutional prohibition, because it would regulate prices charged for the sale of goods—including pharmaceutical products—that occur wholly outside New York. *See* Part I.B, *supra*. After all, most of the generic and biosimilar products Proposed Rule 600.9 would regulate are manufactured outside of New York—and it is exceptionally uncommon for out-of-state generic or biosimilar manufacturers to sell their products directly to purchasers located in New York. Rather, they sell their medicines out-of-state to wholesale distributors also located out-of-state, who then independently sell the medicines to retail or mail-order pharmacies, who in turn dispense the medicines to patients in New York. Thus, by prohibiting a generic manufacturer from charging an “unconscionably excessive” price for a pharmaceutical on the supply-shortage list if the medicine “is *ultimately* sold to a consumer or end-user in New York,” Proposed Rule 600.9(b)(1), the Proposed Rule would necessarily regulate wholly out-of-state prices.

⁸ *See, e.g., Styczinski v. Arnold*, 46 F.4th 907, 913-15 (8th Cir. 2022) (holding that Minnesota law regulating the wholly out-of-state sale of bullion between a dealer and a Minnesota resident violated the extraterritoriality component of the Commerce Clause); *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 612-16 (9th Cir. 2018) (enjoining a California law that purported to “dictate the method by which” medical-waste companies treated medical waste “outside of California,” because it “reach[ed] beyond the borders of California [to] control transactions that occur wholly outside of the State”); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1321-24 (9th Cir. 2015) (en banc) (invalidating a California law that required sellers to pay a 5% premium into an artists’ fund as applied to all “sales outside the State,” even though the law only extended to out-of-State transactions when “the seller resides in California”); *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 366-76 (6th Cir. 2013) (invalidating a Michigan law that imposed “unique-to-Michigan mark designation,” even though it “d[id] not discriminate against interstate commerce,” because it “allow[ed] Michigan to dictate where the product can be sold” and thus “control[ed] conduct beyond the State of Michigan”).

It is no defense that Proposed Rule 600.9 conditions a seller’s liability on the occurrence of an in-state sale, because liability is not limited to the entity that makes the in-state sale; rather, liability flows *upstream* to prices charged in sales that occur entirely *outside* New York. Thus, the Proposed Rule’s requirement of an in-state nexus does not mitigate the dormant Commerce Clause violation; it would still “directly regulate[] transactions which take place across state lines, even if wholly outside [New York].” *Edgar*, 457 U.S. at 641 (plurality opinion).⁹

These constitutional infirmities are magnified when one looks at “what effect would arise if not one, but many or every, State adopted similar legislation.” *Healy*, 491 U.S. at 336; *see also Frosh*, 887 F.3d at 673-74. Allowing states to regulate transactions that occur wholly outside of their borders could subject generic and biosimilar drug manufacturers to inconsistent commands—the Pennsylvania manufacturer seeking to sell a product in Ohio could be forced to follow pricing dictates in Pennsylvania, Ohio, New York, and any number of other states, even if the pricing rules are irreconcilable. The resulting patchwork of competing state standards would in turn impose a severe burden on interstate commerce, resulting in a dormant Commerce Clause violation even apart from the *per se* prohibition against extraterritorial direct regulation. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

If there were any doubt that Proposed Rule 600.9 is unconstitutional, it should be eliminated by the fate of previous efforts to directly regulate the prices charged for prescription drugs in out-of-state transactions. A federal court of appeals struck down a Maryland law similar to Proposed Rule 600.9. *See Frosh*, 887 F.3d 664. Much like Proposed Rule 600.9, Maryland’s law prohibited “excessive” increases in the price of prescription drugs. *Id.* at 666. And similar to Proposed Rule 600.9, the Maryland law was limited to drugs that were “made available for sale in [Maryland].” *Id.* The Fourth Circuit held Maryland’s law “unconstitutional under the dormant commerce clause because it *directly* regulate[d] transactions that take place outside Maryland.” *Id.* at 674 (emphasis added; emphasis omitted). As the Fourth Circuit explained, the Maryland law was structured to regulate out-of-state sales that were upstream of in-state retail sales, and thus sought “to specify the price at which goods may be sold beyond [the State’s] borders.” *Id.* at 673. Proposed Rule 600.9 is unconstitutional for the same fundamental reason.¹⁰

⁹ Although Proposed Rule 600.9 states that “[n]othing in this regulation should be read to conflict with the Dormant Commerce Clause,” Proposed Rule 600.9(d), its text and the Attorney General’s explanation in the NPRM make Proposed Rule 600.9’s extraterritorial reach abundantly clear.

¹⁰ The NPRM states that *Frosh* is “inapposite” because “[t]he statute ... affected all ‘upstream’ transactions executed by manufacturers and wholesalers in respect of the covered medications ... regardless of whether or to what extent any given transaction resulted in particular goods ... being sold in or into Maryland.” NPRM at 24 n.90. This distinction is irrelevant. As explained earlier, the fact that Proposed Rule 600.9 would be *triggered* by an in-state sale or distribution does not change the fact that it *regulates* wholly out-of-state sales—and *those* wholly out-of-state sales likewise “d[o] not result in a single pill being shipped [in]to [New York].” *Frosh*, 887 F.3d at 671. In any event, *Frosh* did not stop there; it went on to hold that the Maryland law still violated the Commerce Clause “[e]ven if [it] ... require[d] a nexus to an actual sale

The District of Minnesota followed the same reasoning to enjoin a Minnesota law that prohibited any generic or biosimilar manufacturer from “impos[ing], or caus[ing] to be imposed, an excessive price increase, whether directly or through a [third party], on the sale of any generic or off-patent drug sold, dispensed, or delivered to any consumer in [Minnesota].” *Ellison*, 704 F. Supp. 3d at 951 (quoting Minn. Stat. Ann. § 62J.842(1)). Like Proposed Rule 600.9, which regulates out-of-state sales of medicines on a short-supply list (and other goods) solely because the medicines are “ultimately sold ... in New York,” Proposed Rule 600.9(b)(1), the Minnesota law “target[ed] ... the upstream pricing and sale of prescription drugs” by imposing liability on out-of-state manufacturers for wholly out-of-state sales simply because “somehow, someday, in some way, someone who is *not* a party to the transaction ... sell[s], dispense[s], or deliver[s] the drug to a[] consumer in Minnesota,” *Ellison*, 704 F. Supp. 3d at 955 (citation omitted). The court held the Minnesota law was likely unconstitutional for the same reasons articulated by *Frosh*: “the dormant Commerce Clause prohibits states from regulating out-of-state transactions,” and “[j]ust as in *Frosh*, the [Minnesota law] ‘effectively s[ought] to compel manufacturers ... to act in accordance with [Minnesota] law outside of [Minnesota].’” *Id.* at 953, 956 (quoting *Frosh*, 887 F.3d at 672) (first alteration added). As the district court recognized, there is no “support for the notion that the dormant Commerce Clause permits [a state] to directly regulate a sale that occurs in another state simply because the product eventually makes its way into [that state].” *Id.* at 954.

The same principles apply fully in New York. The failure to require any geographic connection to New York resulted in invalidation of a part of New York’s Opioid Stewardship Act (“OSA”), N.Y. Pub. Health Law § 3323. The OSA sought to force opioid manufacturers and distributors to bear costs of the opioid crisis, and it prohibited them from “passing through” to their customers any portion of what they paid to New York. *Healthcare Distribution All. v. Zucker*, 353 F. Supp. 3d 235, 246 (S.D.N.Y. 2018). Raising prices—even outside New York—in a way that New York disapproved would result in up to a \$1 million penalty. The district court held that the law did not limit itself to New York transactions, and that such a direct regulation of transactions conducted out of state violates the dormant Commerce Clause’s prohibition on extraterritorial state legislation. *Id.* at 261-62. Although New York claimed it would not enforce the law that way, the district court held that the facial absence of any jurisdictional nexus was fatal. *Id.* And, as noted above, “the State elected not to seek reversal of the District Court’s invalidation of the pass-through prohibition,” *AAM v. James*, 974 F.3d at 218, perhaps recognizing that the pass-through prohibition was indefensible.

Earlier efforts to directly regulate out-of-state drug sales fared no better. Nearly two decades before, the U.S. District Court for the District of Maine enjoined as unconstitutional a similar “anti-profiteering” drug-pricing law in *PhRMA v. Commissioner*, CIV. 00-157, 2000 WL 34290605 (D. Me. Oct. 26, 2000). The provision there barred manufacturers from “extract[ing] or demand[ing] an unconscionable price” for drugs. *Id.* at *2. But because the “drug

in Maryland,” because the Maryland statute “measured” the lawfulness of a sale “according to the price the manufacturer or wholesaler charges *in the initial sale of the drug*” outside Maryland. *Id.* (first emphasis added).

manufacturers” affected by this law were based outside of Maine, and all regulated sales by those manufacturers took place outside of Maine (with certain immaterial exceptions), the statute was invalid. *Id.* at *2, *4. Maine did not appeal this ruling, even though it did appeal other aspects of the same district court decision, apparently concluding that no reasonable defense could be offered. *See Concannon*, 249 F.3d at 72 n.2. In similar fashion, the U.S. District Court for the District of Columbia invalidated on Commerce Clause grounds a city ordinance that prohibited “drug manufacturer[s],” but not “retail seller[s],” from “sell[ing] or supply[ing] for sale or impos[ing] minimum resale requirements for a patented prescription drug that results in the prescription drug being sold in the District for an excessive price.” *Pharm. Research & Mfrs. of Am. v. District of Columbia*, 406 F. Supp. 2d 56, 60, 68 (D.D.C. 2005) (quoting D.C. Code Ann. § 28-4553).

Courts have not grown any more tolerant of extraterritorial state legislation over the subsequent two decades. The decisions in *Frosh*, *Ellison*, and *Zucker* show that the opposite is true. And only a few years ago, the Eighth Circuit held unconstitutional a Minnesota law regulating sales “between a bullion trader and a Minnesota resident” that occurred “anywhere in the world.” *Styczinski*, 46 F.4th at 913. Because traders could “become subject to and violate Minnesota law without conducting a single transaction in Minnesota,” the Eighth Circuit held that the law “unconstitutionally control[led] wholly out-of-state commerce.” *Id.*; *see also Ass’n for Accessible Medicines v. Bonta*, No. 2:20-cv-01708, 2025 WL 489713, at *1 (E.D. Cal. Feb. 13, 2025) (holding a California law unconstitutional under the dormant Commerce Clause that regulated the terms of settlement agreements entered into wholly outside that State).

Under this case law, the unconstitutionality of Proposed Rule 600.9 is not a close call. If promulgated into law, Proposed Rule 600.9 would violate a fundamental restriction on states’ ability to impose price restrictions beyond their borders.¹¹

The Supreme Court’s decision in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023), cannot save Proposed Rule 600.9 from unconstitutionality. *Cf.*, NPRM at 22-23 (discussing *Ross*). The California law in that case prohibited the “the *in-state* sale of whole pork meat that comes from breeding pigs” housed under conditions California deemed cruel. 598 U.S. at 365 (emphasis added). In upholding that law against a Commerce Clause challenge, the Supreme Court rejected the plaintiffs’ argument that the California law was *per se* invalid simply because it had “the ‘*practical effect* of controlling commerce outside the State” by necessitating

¹¹ Neither of the pre-*Ross* court of appeals decisions cited in the NPRM support a different conclusion. *See* NPRM at 23-24. In the first case—*Online Merchs. Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021)—the court of appeals upheld the Kentucky Attorney General’s effort to enforce the State’s price-gouging law “against *Kentucky-based sellers* in connection with sales *to Kentucky consumers* through Amazon’s platform.” *Id.* at 544 (emphasis added); *see also id.* at 554. Although the court of appeals upheld the law by concluding that it did not have impermissible extraterritorial *effects*—an inquiry no longer relevant post-*Ross*—nothing in *Online Merchants Guild* approves state laws that directly regulate wholly out-of-state commerce. So, too, with *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010), which upheld State laws under the dormant Commerce Clause that regulated only cigarettes “sold *in New York*.” *Id.* at 66 (emphasis added).

that out-of-state pork producers change how they housed pigs to make their pork sellable in California. *Id.* at 371 (emphasis added); *see also id.* at 374-75. But in rejecting California’s “practical effects” theory, the Court did not approve state laws that *directly* regulate transactions that occur wholly out-of-state, rather than the in-state sale itself. To the contrary, the Court preserved its prior decisions invalidating price-control and price-affirmation laws as impermissible extraterritorial regulations, and favorably cited the Fourth Circuit’s *Frosh* decision in the process. *Id.* at 373-76. Moreover, *Ross* was careful to distinguish the California law from the Illinois tender-offer law that a plurality of the Court held impermissibly extraterritorial in *Edgar v. MITE Corp.* *See id.* at 376 n.1. Unlike the California law, which applied exclusively to *in-state* sales, the Illinois law “*directly* regulated out-of-state transactions.” *Id.*; *see Edgar*, 457 U.S. at 641 (plurality opinion) (“The Illinois Act ... directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois.”). Thus, although *Ross* clarified that a state law will no longer be deemed *per se* invalid simply because it *indirectly affects* out-of-state conduct, that decision did not address, much less displace, the existing prohibition on state action—like Proposed Rule 600.9—that “*directly* regulated out-of-state transactions.” 598 U.S. at 376 n.1.¹²

Furthermore, other aspects of the Constitution, such as the Due Process Clause, impose similar restrictions on one state’s ability to regulate sales that occur in another state. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930); *Gerling Glob. Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1236-40 (11th Cir. 2001). These restrictions are comparable in substance to those imposed by the dormant Commerce Clause—for that reason, the complete set of constitutional protections on out-of-state regulation has been called the “horizontal separation of powers.” And there is no conceivable argument that the Due Process Clause bars such extraterritorial regulation only if it is done with a protectionist purpose.

Adopting Proposed Rule 600.9 will come at a cost—literally. When a state adopts an unconstitutional law and forces challengers to go to court to vindicate their constitutional rights, federal courts require the state to reimburse the challengers’ attorney’s fees. 42 U.S.C. § 1988. Adopting this proposed regulation will just expose the State of New York to significant attorney’s

¹² The NPRM suggests that, after *Ross*, the dormant Commerce Clause exists solely to “restrain protectionism” or discrimination. NPRM at 23. That is incorrect. Although *Ross* rejected the “practical effect” theory advanced in that case, nothing in *Ross* rejected other Commerce Clause claims or held that only discriminatory state laws can violate the Commerce Clause. If *Ross* had meant to foreclose all extraterritoriality claims involving non-discriminatory laws, it would have rejected the plaintiffs’ reliance on the *Edgar* plurality on that basis. That *Ross* instead chose to distinguish the California law from the law in *Edgar* confirms that the Court was consciously leaving intact the rule that direct regulation of transactions in another State is unconstitutional—which is exactly what every court to interpret *Ross* has concluded. *See Ellison*, 704 F. Supp. 3d at 953 (“[*Ross*] did not change the rule that a state may not directly regulate transactions that take place wholly outside the state and have no connection to it.”); *Nat’l Shooting Sports Found. v. Bonta*, 718 F. Supp. 3d 1244, 1256 n.1 (S.D. Cal. 2024) (similar); *Interlink Prods. Int’l, Inc. v. Crowfoot*, 678 F. Supp. 3d 1216, 1223 (E.D. Cal. 2023) (similar).



The Honorable Letitia James
Page 14

fees and costs, just as Maryland's price-control effort ended with Maryland paying AAM's legal expenses.

* * * * *

On behalf of AAM, I urge you not to adopt Proposed Rule 600.9 or any variant of it that exceeds the limits of the New York statute it purports to enforce and the Constitution's limits on extraterritorial state legislation. AAM and its members are committed to ensuring consumers in New York and elsewhere have access to affordable medications and remain ready and willing to work with the State to further that important goal. This unlawful regulation will not aid that effort.

Sincerely,

A handwritten signature in blue ink that reads "William M. Jay".

William M. Jay

April 14, 2025

Honorable Letitia James
Attorney General of New York State
1 Empire State Plaza
The Capitol
Albany NY 12224

**Healthcare Distribution Alliance Comments
Re: Proposed Rules for Price Gouging, Title 13 NYCRR**

On behalf of our member companies, the Healthcare Distribution Alliance (HDA) would like to thank you for this opportunity to provide further comments on proposed regulations implementing New York GBL 396-r. HDA supports the intended goal of the statute and proposed regulations to increase transparency and protections for consumers during times of crisis. We also greatly appreciate that several suggestions made by HDA in previous letters were taken into account. However, on behalf of the pharmaceutical distribution industry, we still believe that the proposed rules should take into further account the unique and specific structure of the pharmaceutical supply chain to help ensure the healthcare supply chain remains strong, resilient, and efficiently serving patients across New York.

HDA is the national trade association representing pharmaceutical wholesale distributors, the vital link between roughly 1,200 pharmaceutical manufacturers and more than 330,000 pharmacies and other healthcare settings nationwide, including nearly 22,850 points of care in New York. HDA members work around the clock to save the U.S. healthcare system billions of dollars annually through efficient management of drug supply chain logistics. Additionally, distributors are unlike any other supply chain participants – their core business does not involve manufacturing, marketing, prescribing or dispensing medicines, nor do they set the Wholesale Acquisition Cost (WAC), or list price of prescription drugs, influence prescribing patterns or determine patient-benefit design. Rather, our members serve as the logistical experts within the supply chain who ensure products are physically on pharmacy shelves where and when patients need them.

HDA respectfully makes the following recommendations, which we believe will avoid any unintentional negative impacts on the supply chain and patient access.

1.) Comments on LAW-06-25-00010-P

HDA appreciates that the Department has considered the pricing threshold and understands the Department's stated goal of aligning with states like New Jersey. However, it still remains HDA's position that not all products can or should be regulated in the same way, and believe the blanket 10% threshold is too rigid of a standard to account for regular market fluctuations, and therefore should not be considered "unconscionably excessive," as the statute states. HDA requests that New York follow the precedent set by several other states and set the threshold no lower than 20%.

This is especially true when it comes to the pharmaceutical supply chain, a unique market which is responsible for ensuring highly regulated and critically essential medicines are safely and securely delivered to patients and consumers across New York. A 10% threshold fails to take into account the standard market fluctuations of generic medications specifically, fluctuations which may reflect up to a 10% increase or decrease in pricing, but which ultimately represent a price change of only a few cents or dollars. For example, a 10% increase for a \$10 drug would equate to \$11.00.

While distributors do not set the list prices for drugs, as the logistical experts who ensure products make it onto shelves where and when they are needed, the resiliency and efficiency of the supply chain is of top priority to our members. Accordingly, HDA believes that labeling nominal price fluctuations price gouging, or requiring nationally-based companies to make dramatic changes to the pharmaceutical marketplace and supply chain due to “abnormal market conditions” in New York, would in fact create expenses and burdens on supply chain entities which would far outpace any savings to consumers. It would also create an expensive burden on the State to enforce such a nominal price increase standard on thousands of manufacturers and hundreds of thousands of products.

Further, HDA appreciates the addition of language that “the seller may rebut the prima facie case with evidence that the amount of increase in the price of the scrutinized sale was necessary to preserve the margin of profit that the defendant seller received for the same essential product, or to recover additional costs not within the control of the seller imposed on the seller for the essential product”. However, due to the nature of the pharmaceutical marketplace as described above, a low threshold of 10% could lead to a high volume of cases in which a distributor would need to present such evidence, leading to costly and disruptive operational burdens for both the supply chain and the state. A 20% threshold would help mitigate this concern.

Additionally, to further prevent operational burdens for distributors and the state, and to protect consumers and help the State better accomplish its goals, HDA and our members recommend the state establish separate thresholds for brand medications and generic medications. Brand and generic medications each occupy separate markets and follow separate pricing mechanisms, with the generic market generating significant cost savings to consumers. Price fluctuations occur regularly in the generics market due to its competitive nature, a model which has consistently driven down costs for patients. The generic pharmaceutical market also has thin margins, trying to regulate the generic and brand marketplace in the same manner will likely result in unintended consequences. For instance, applying price gouging thresholds that are too low to account for the generic market’s regular price fluctuations and thin margins could drive products or manufacturers out of the market in New York, creating conditions for generic drug shortages. Shortages in the generic market would restrict or prevent New York patients’ access to medications and the savings offered by generics, ultimately driving up their out-of-pocket costs and defeating the purpose of this policy effort.

To support the marketplace while also protecting consumers, **HDA recommends utilizing a 20% threshold for brand medications**, which would follow the precedent of several states. HDA recommends the State follow the precedent of at least three states and **utilize a 25% threshold for generic medications**, in order to allow the generics market to retain its competitive and affordable nature.

HDA requests the Department consider the following language amendment:

*Section 600.6. Gross Disparities Between Post-Disruption and PreDisruption Price. (a) Gross Disparities in Price from Pre-Disruption Price. During a disruption, the sale of an essential product, **except pharmaceutical medications**, at a price that is greater than **10%-20%** of that*

essential product's pre-disruption price represents a gross disparity in price for purposes of General Business Law § 396-r(3)(b)(i).

For pharmaceutical medications, a brand product with a price increase at or below 20% shall not be considered a gross disparity in price. For generic products, a price increase at or below 25%, or \$25, whichever is greater, shall not be considered a gross disparity in price.

Additionally, HDA appreciates that language defining “abnormal market disruption” was added, but we respectfully believe that language could be made more explicit. HDA requests the Department provide further guidelines that businesses operating in the State can follow. For example, stating the Governor would also declare an end to a declaration of emergency, or that such declarations would specify what geographical area of the state is affected.

2.) Comments on LAW-06-25-00006-P. Presumptive Unfair Leverage for Large Enterprises or Enterprises with Large Market Share

HDA appreciates the Department's efforts to define “market share”, however we still respectfully believes that while defining "unfair leverage" as 30% of the market, with a 10% share in more concentrated markets, may potentially apply to businesses that directly control their markets, this standard becomes an arbitrary and punitive threshold when applied to ancillary businesses, like wholesaler distributors, who do not directly set the originating list prices of the products they sell, regardless of their “market share.” While HDA additionally appreciates that a seller may rebut presumption of unfair leverage based on margins of profit remaining the same or additional costs not within control of the seller being imposed on the seller for the essential product sale being scrutinized, being required to provide such evidence simply based on market share would create costly and burdensome disruptions for both industry and the state.

This is especially true for pharmaceutical wholesale distributors, who operate under a unique model. Distributors contract with roughly 1,200 manufacturers to safely warehouse and efficiently ship medication and other healthcare products to nearly 330,000 points of care across the nation. The manufacturer, not the wholesaler, sets the Wholesale Acquisition Cost (WAC), or list price, for their products. Pharmaceutical wholesale distributors purchase pharmaceutical products based on the WAC price set by the manufacturer, and subsequently sell these products to pharmacy customers at WAC or WAC minus a percentage. For the distribution services they provide, pharmaceutical wholesale distributors will then charge manufacturers a service fee, these fees are not passed down to the subsequent purchaser and underwrite the cost of warehousing, ordering, special product handling services and transporting products to the thousands of ship-to points each distributor serves every day. A wholesale distributor has no insight or authority over a manufacturer choosing to increase the list price of certain products.

HDA represents nearly 40 of the nation's primary pharmaceutical wholesale distribution companies, who are responsible for delivering around 90 percent of the nation's pharmaceutical products. However, these duties are performed on behalf of over 1,200 manufacturers. Without distributors, each manufacturer would be responsible for the secure and efficient delivery and shipment of their products to each point of care, which would dramatically increase costs in our healthcare system. Proposing that 30% of market share creates an unfair leverage is unrealistic and harmful to industries, like wholesalers, whose main role is to support the delivery and logistics of ensuring consumer access to products from a much larger market.

This becomes even more burdensome for businesses that operate on a national or regional scope. When a distributor makes the original purchase from a manufacturer, they are often made in bulk to achieve cost savings and then sent directly to a regional or national distribution facility, often not within the state of New York. Those products are then shipped to various points of care across the nation. At the time of the original purchase, there is no way for a pharmaceutical distributor to know in advance where or to which state the product will ultimately be delivered. Further, our companies generally work under contract with pharmaceutical manufacturers. These are often long-term contracts ranging from 3-5 years covering multiple product categories. This adds another layer of complexity since these purchases and sales often take place entirely out of state, outside of any rules New York may have activated. Specific to the pharmaceutical wholesale industry, under the current distribution model as outlined above, our members are proud of the fact that our industry saves the U.S. healthcare system up to 63 billion dollars annually due to the logistical efficiencies this model provides¹.

Due to all the concerns highlighted above, HDA strongly recommends that New York follow the precedent set by other states and not include this market share provision in any final rules. We request the complete removal of LAW-06-25-00006-P . However, should the Department choose to keep the language intact, we request that there be an exemption for entities that do not set the list price of the products they sell, like pharmaceutical wholesale distributors.

Conclusion

In summary, HDA believes that the pharmaceutical supply chain, and particularly ancillary entities such as pharmaceutical distributors, cannot be regulated in the same way as the marketplace for any other product. Rather, it is crucial that regulations reflect the unique complexities of the industry to not impede on their ability to safely and securely deliver medicines, vaccines and other healthcare products to pharmacies, hospitals and other healthcare settings across the New York.

Thank you for your consideration of our concerns and language amendment requests as the Department moves forward with rulemaking. Please contact me at any time with questions or for further conversation at kmemphis@hda.org or at 443.375.6541.

Sincerely,



Kelly Memphis
Director, State Government Affairs
Healthcare Distribution Alliance

¹ <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/life-sciences-health-care/us-hda-role-of-distributors-in-the-us-health-care-industry.pdf>



April 11, 2025

Office of the New York State Attorney General
The Capitol
Albany NY 12224-0341

Re: Price Gouging

I.D. No. LAW-06-25-00005-P, I.D. No. LAW-06-25-00006-P, I.D. No. LAW-06-25-00007-P, I.D. No. LAW-06-25-00008-P, I.D. No. LAW-06-25-00009-P, I.D. No. LAW-06-25-00010-P, I.D. No. LAW-06-25-00012-P

To whom it may concern:

On behalf of the American Hotel & Lodging Association (AHLA) and the New York State Hotel & Tourism Association (NYSHTA), we write regarding the above referenced rules that govern price gouging.

AHLA is a national association representing all segments of the U.S. lodging industry, including hotel owners, real estate investment trusts, chains, franchisees, management companies, independent properties, bed & breakfasts, state hotel associations, and industry suppliers. The industry is comprised of more than 62,000 properties, 33,000 of which are small businesses, and more than 5.6 million hotel rooms across the country. The American lodging industry services more than 1.4 billion rooms per year, supports more than 7 million jobs, and generates more than \$52 billion in state and local tax revenue.¹

The New York State Hospitality & Tourism Association (NYSHTA) is the oldest state lodging association in the country. NYSTHA represents 1,000 members including hotels, motels, resorts, conference centers, country inns, bed & breakfast establishments, reservation service organizations, amusement parks, attractions, museums, ski areas, recreational facilities, historical sites, convention and visitor bureaus, chambers of commerce, colleges and universities, hospitality students, and suppliers to the industry.

AHLA and NYSTHA are committed to working with the Attorney General on this issue but have concerns that the proposed rules are overly broad and do not take into consideration the unique factors impacting the hotel and lodging industry in New York.

600.5 Pre-Disruption Price Determination/600.6 10% Gross Disparity Rule

Hotels have a complex price structure that is based on a variety of internal and external factors, including seasonality, external events, and customer demand. The proposed rules do not contemplate pricing differences for these external factors that are unrelated to a state of emergency.

Pricing of hotel rooms are affected by seasonal high-demand events like sporting events, concerts, conventions or other ad-hoc events that may unfortunately coincide with a “triggering event.”

For example, if a resident affected by a “triggering event” goes to a neighboring area that has a convention, the prices of those hotel rooms would exceed the 10% maximum rate increase and under the

¹ For more information about AHLA and its members, please visit <https://www.ahla.com>.

limited “benchmark date” definition are subject to the proposed regulations. These unfortunate situations are not the result of price gouging, but instead due to the high demand for the hotel rooms pre-triggering event.

These concerns are of particular concern due to the potential extended States of Emergency. For example, during the COVID pandemic, New York State operated under a state of medical emergency for *over two years*. Even now, New York is currently operating under several extended state of emergencies that continue to be extended.²

Furthermore, hotels would most likely fall under the price determining standard set in 600.5(b)(3), as the price of a hotel room is variable on a given day, without respect to the identity of the buyer. This standard sets the price determination standard as the median rate charged by the seller immediately prior to the benchmark date. However, not only is “immediately” not defined, this standard does not take into consideration the external factors that are completely independent of the triggering event.

Suggested language:

600.5(b)(3)

(3) If it was the seller’s usual course of business to offer the essential product at variable prices on a given day but without respect to the identity of the buyer, the median price charged by the seller to all buyers for the same essential product in all sales made by the seller in the State of New York immediately prior to the benchmark date or

- (i) the amount of increase in the price of the scrutinized sale necessary to preserve the margin of profit that the defendant seller received for the same essential product, or
- (ii) to recover additional costs not within the control of the seller imposed on the seller for the essential product, is an amount sufficient to cause the remaining disparity between the price of the scrutinized sale and the pre-disruption price to be less than 10%, or,
- (iii) the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business, or
- (iv) the price increase is consistent with seasonal pricing charged by the seller based on historical data showing prices charged during the same season the past three years or to previously contracted rates, or
- (v) other circumstances where it may be reasonable to allow price increases outside of the range of customary increases, such as special events.

Suggested language:

600.6(b)

If a gross disparity in price is established pursuant to subdivision (a) of this rule for a scrutinized sale, the seller may rebut the prima facie case with evidence that:

² <https://www.governor.ny.gov/keywords/executive-order?page=0#views-exposed-form-filter-frame-keywords>

- (vi) the amount of increase in the price of the scrutinized sale necessary to preserve the margin of profit that the defendant seller received for the same essential product, or
- (vii) to recover additional costs not within the control of the seller imposed on the seller for the essential product, is an amount sufficient to cause the remaining disparity between the price of the scrutinized sale and the pre-disruption price to be less than 10%, or,
- (viii) the increase in price is directly attributable to additional costs imposed on it for goods or labor used in its business, or
- (ix) the price increase is consistent with seasonal pricing charged by the seller based on historical data showing prices charged during the same season the past three years or to previously contracted rates, or
- (x) other circumstances where it may be reasonable to allow price increases outside of the range of customary increases, such as special events.

Rule 600.8

The proposed definition of “triggering event” is ambiguous as it is not clear if one of the initial causes identified under (2)(i)-(viii) and a declaration of a state of emergency by the Governor is needed for the price gouging laws to be triggered, or if the declaration of a state of emergency is only required where there is an “other cause of an abnormal disruption of the market” as outlined in (2)(ix).

We request the definition be clarified to confirm whether a Governor declaration of state of emergency only applies to these abnormal disruptions of the market or if it also applies to (2)(i) – (viii). We believe it is appropriate to require that a state of emergency always be declared as a prerequisite to a triggering event to avoid any confusion as to whether these rules are in effect at a given time.

Additionally, we have concerns regarding inclusions of a “convulsion of nature,” “strike,” or “failure or shortage of electric power or other source of energy” in the definition of a triggering event. The term “convulsion of nature” is inherently ambiguous. We assume it refers to an earthquake, mud slide, avalanche, or tsunami/tidal wave, etc. but believe identifying specific acts of nature that are intended to be covered or the use of a common phrase, such as “natural disaster” would provide greater certainty.

With respect to strikes and power failures or shortages, we note that, in many circumstances, these events may be ephemeral or localized and often do not necessitate a broader emergency response. We respectfully ask for further clarification on these types of events which may be temporary or targeted in nature. Our concern as to strikes and power failures might be reduced if the definition of “triggering event” made it clear that a triggering event requires both a strike/power failure and a declaration of a state of emergency by the Governor. We also note that “fires” or “wildfires” are not included in the list of circumstances possibly leading to a “triggering event”.

Rule 600.9 – Geographic Scope

We also have concerns about the overly broad geographic scope of the rule. The rule makes it clear that any business that is either advertising or selling a product or service to a NY based consumer – regardless of the products location. This means that a hotel based in California could be subject to the provisions of this rule simply because a NY based guest booked a stay at the hotel.



We also believe that the geographic scope is overly broad given the sheer size and geographic diversity of the State. It is not unthinkable that the Governor might declare a weather-related state of emergency due to the impacts in one part of the state that does not impact another part of the state. For example, under the current rule, a major snowstorm in upstate New York could trigger the price gouging limitations for New York City – even if the storm isn’t impacting the City.

We thank you for your consideration of these comments. If we can be of further assistance, please do not hesitate to contact us at sbratko@ahla.com or mark@nyshta.org.

Sincerely,

Sarah R. Bratko, Vice President & Policy Counsel
American Hotel & Lodging Association

Mark Dorr, President
New York State Hospitality & Tourism Association

April 14, 2025

Price-Gouging Rulemaking
Consumer Frauds and Protection Bureau
Office of the New York Attorney General
28 Liberty Street
New York, NY 10005

**Re: Comments of Airlines for America to the Proposed Rule Making on Price Gouging
(Id. Nos. LAW-06-25-00005-P through -00012-P)**

Dear Consumer Frauds and Protection Bureau:

Airlines for America (A4A) is the trade association for the leading U.S. airlines.¹ We advocate on behalf of our members to shape crucial policies and measures that promote safety, security and a healthy U.S. airline industry. We write to respectfully remind the Office of the New York Attorney General that the federal government exclusively governs the pricing practices of air carriers and therefore ask that you confirm that the proposed rules regarding price gouging (hereinafter “NPRM”)² do not apply to air carriers.

As proposed, the NPRM would establish rules to protect consumers from pricing practices that may be considered price gouging. A4A applauds your efforts to ensure that customers are protected from unscrupulous pricing practices, but we ask that you keep in mind that the Airline Deregulation Act of 1978 (ADA) already authorizes the U.S. Department of Transportation to prohibit air carriers or ticket agents from engaging in “an unfair or deceptive practice or an unfair method of competition” in the sale of air transportation that results or is likely to result in consumer harm.³

With the ADA, Congress sought to place “maximum reliance on competitive market forces” to encourage “an air transportation system relying on actual and potential competition.”⁴ It included a provision in the ADA to “ensure that the States would not undo federal deregulation with regulation of their own.”⁵ Specifically, the ADA provides that the U.S. government exclusively governs air carriers’ prices, routes or services—“a State, political subdivision of a State, or a political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service* of an air carrier that may provide air transportation”⁶ In sum, it is assured that state regulations directly relating pricing, such as the NPRM, are not enforceable against airlines.

¹ A4A’s members are Alaska Air Group, Inc.; American Airlines Group, Inc.; Atlas Air Worldwide Holdings, Inc.; Delta Air Lines, Inc.; FedEx Corp.; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

² Vol. XLVII, N.Y. Reg. 2 – 15 (Feb. 12, 2025) (Department of Law, Proposed Rule Making, Price Gouging, LAW-06-25-00005-P through -00012-P).

³ 49 U.S.C. § 41712.

⁴ 49 U.S.C. § 40101.

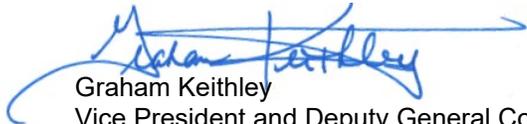
⁵ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 – 379 (1992).

⁶ 49 U.S.C. § 41713 (emphasis added). In alignment, the U.S. Supreme Court held that the ADA has a “broad pre-emptive purpose” and any state law having “a connection with, or reference to, airline ‘rates, routes, or services’ is preempted under the ADA.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–85 (holding that the ADA preempted state regulation of airline disclosures and advertising); see *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995) (“States may not seek to impose their own public policies or . . . regulation on the operations of an air carrier.”). See also *Air Transp. Ass’n of Am. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008) (recognizing and enforcing exclusive Federal jurisdiction, enjoining New York from implementing or enforcing New York State’s Passenger Bill of Rights because it regulated airline prices, routes and services).

However, let me assure you, A4A members are committed to providing the highest quality of service, which includes clarity regarding prices, fees and ticket terms. Since deregulation of the U.S. airline industry in 1978, domestic fares—including fees—have dropped nearly 50 percent, when adjusted for inflation. In addition to giving customers many service options, including refundable fares, airlines work hard to meet the needs of customers during operational disruptions, such as waiving fees or capping fares.

Therefore, A4A requests that, when adopting the final regulations, the rulemaking explicitly confirm that these rules are not applicable to air carrier pricing. We appreciate you considering this request and welcome a call to discuss further. Please do not hesitate to e-mail me at gkeithley@airlines.org.

Sincerely,



Graham Keithley
Vice President and Deputy General Counsel,
Regulatory Legal Affairs

cc: Chris D'Angelo, Chief Deputy Attorney General, Economic Justice Division



April 14, 2025

Office of Attorney General Letitia James

The Capitol

Albany, NY 12224-0341

(Submitted by email to stopillegalprofiteering@ag.ny.gov)

Re: Comments of the American Petroleum Institute on Proposed Price Gouging Rules.

Dear Attorney General James:

The American Petroleum Institute (API) submits these comments on the proposed price gouging rules (Proposed Rules) issued by the New York Attorney General's office (NYAG).¹ The NYAG has published eight separate, but related rulemaking proposals. For consistency and continuity, API provides comments on all eight proposals in this single letter. We ask that the NYAG include and consider these comments in the dockets for each of the eight proposals.

API is the national trade association representing all sectors of the U.S. oil and natural gas industry, with nearly 600 members throughout exploration, refining, pipelines, distribution, and retail. API's members support more than 11.3 million jobs and produce, process, and distribute most of our Nation's energy. API works to support a strong, viable American oil and natural gas industry. API therefore has a keen interest in the rigorous, consistent, and predictable application of statutes that directly affect its members' abilities to contribute to the national economy through the production, distribution, and sale of oil and natural gas.

As it has in previous comments, API once again urges NYAG to rethink the Proposed Rules in their entirety. Section 396-r, the price gouging statute, is impermissibly vague—the kind of vagueness that raises serious constitutional concerns about arbitrary enforcement. See Part I. The best use of NYAG's limited rulemaking authority would therefore have been to provide guidance that would place clear and meaningful limits on NYAG's enforcement discretion. Instead, the proposed rules would improperly and unlawfully *increase* NYAG's authority under the statute, expanding the number of ways NYAG may prove its case while curtailing the defenses available to sellers. Because they exceed the scope of NYAG's permissibly delegated authority, the Proposed Rules are unlawful. They are also misguided, often only adding confusion to an already confusing statute. See Part II.

¹ <https://ag.ny.gov/rulemaking-laws-price-gouging> (to be codified at 13 NYCRR Parts 600.1 to 600.10); 6 NY Register 2-15 (Feb. 12, 2025).

I. Section 396-r Raises Serious Constitutional Concerns.

The statutory provision that these Proposed Rules seek to implement, Section 396-r, is unconstitutionally vague. Laws violate the constitutional prohibition against vagueness where they “fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [they] prohibit[],” *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012), or when they “do[] not provide explicit standards for those who apply [them],” *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 191 (2d Cir. 2010) (alteration adopted).

First, in many (if not most) instances, a person of ordinary intelligence would not know in advance whether a particular price increase falls foul of the statutory prohibition. In that respect, the statute’s mention of “unconscionably excessive price[s]” is no clearer than the prohibition against “charging an ‘unjust or unreasonable’ rate” that the Supreme Court has long recognized as unconstitutionally void. See *Johnson v. United States*, 576 U.S. 591, 602 (2015) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). In *Cohen Grocery*, the Supreme Court held that a statute making it “unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries” was unconstitutionally vague because it failed to set “an ascertainable standard of guilt” and was “[in]adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them.” *Id.* at 89. In particular, the Court noted that the law “forbids no specific or definite act” and by its “terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.” *Id.* Section 396-r fails for the same reason as the statute in *Cohen Grocery*.

The statute’s guidance about the meaning of “unconscionably excessive price[s]” is no clearer about what conduct is prohibited and what is permitted. It is circular to say, as the statute does, that an “unconscionably excessive price” is one that is “unconscionably extreme.” See N.Y. Gen. Bus. Law § 396-r(3)(a)(i). And businesses are left similarly in the dark by the admonition that a price is illegally high if “there was an exercise of unfair leverage or unconscionable means.” *Id.* § 396-r(3)(a)(ii).

Second and for the same reason, the [statute] does not supply sufficiently explicit standards “to eliminate the risk of arbitrary enforcement.” *VIP of Berlin*, 593 F.3d at 191. To be sure, “interpretations the relevant courts have given to analogous statutes” might shine some light on the meaning of an ambiguous statute, *Commack*, 680 F.3d at 213, but similar New York laws provide no such guidance here.

Consider caselaw concerning section 396-rr, New York’s milk-specific price-gouging statute. That statute provides that the government may “start an inquiry into whether an ‘unconscionably excessive’ retail price exists when [it] finds a retail price that

exceeds 200 percent of the price paid to milk producers.” *Greater N.Y. Metro. Food Council v. McGuire*, 815 F. Supp. 706, 711 (S.D.N.Y. 1993); see N.Y. Gen. Bus. Law § 396-rr(2). This provision, the Southern District of New York explained, gave some indication as to what degree of price increase would be unlawful under the milk-specific statute: “It seems reasonable to conclude that the legislature intended a retail price in excess of 200 percent of the price paid to producers to be regarded as a price reflecting a ‘gross disparity’ between the retail price and the price to producers.” *Greater N.Y. Metro.*, 815 F. Supp. at 711. But section 396-r contains no such benchmark. So, unless NYAG agrees that an increase of 200% is the minimum necessary to trigger section 396-r (NYAG does not, see Proposed Rule 600.5 at 29), caselaw about the milk-specific price-gouging statute tells us nothing about the meaning of the *general* price-gouging statute.

Or consider the Donnelly Act, another consumer-protection law that prohibits anticompetitive conduct. That Act and its federal counterpart contain a cryptic prohibition against agreements “in restraint of trade.” 15 U.S.C. § 1; N.Y. Gen. Bus. Law § 340(1). But those statutes are saved from vagueness because they contain an “objective standard,” *United States v. Kozminski*, 487 U.S. 931, 951 (1988), drawn “from the common law [of] the restraint of trade,” *Nash v. United States*, 229 U.S. 373, 377 (1913). To establish liability for a restraint of trade under the Donnelly Act, the plaintiff must define and prove the existence of an “economically significant product market.” *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 823 N.Y.S.2d 79, 82 (2d Dep’t 2006).

Section 396-r, by contrast, lacks any equivalent standards even though the statute refers throughout to economic concepts such as “the market,” and “similar goods and services.” Because of this lack of guidance, courts have varied wildly in their approach to determining the relevant product market under section 396-r, in one case finding it to be as broad as the market for “gasoline,” *People ex rel. Spitzer v. My Serv. Ctr., Inc.*, No. 06/21157, 2007 WL 102463, at *2 (Sup. Ct. Jan. 17, 2007), and in another to be as narrow (and as implausible) as the market for a single brand of disinfectant, see *People ex rel. James v. Quality King Distributors, Inc.*, 173 N.Y.S.3d 221, 230–31 (1st Dep’t 2022) (Lysol as its own product market). This “shifting, vague, and indeterminate [] standard” is unconstitutional. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.); cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) (explaining that a judicial determination as to “whether prices are reasonable” was too “uncertain a test”).

Or consider the precondition for section 396-r to take effect: an “abnormal disruption of the market.” N.Y. Gen. Bus. Law § 396-r(2). An “abnormal” kind of disruption apparently occurs whenever there is “any change in the market” “resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of

an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.” *Id.* (emphasis added). Again, vagueness abounds. The term “market” remains undefined. The change in the market need only be “imminently threatened.” *Id.* And, according to one court, “[a] declaration of a state of emergency by the Governor . . . is *not* a precondition to the onset of an abnormal disruption of a market under the statute,” *Quality King Distribs.*, 173 N.Y.S.3d at 231 (emphasis added). Little wonder, then, that *all twenty-five* jurisdictions NYAG cites in its proposed rules have sought to avoid this uncertainty by requiring a government declaration of emergency for their price-gouging rules to be triggered.² *Cf.* Proposed Rule 600.6 at 20, 21 (asserting that the uniformity of certain provisions across just *eleven* of those jurisdictions is evidence of “national consensus” about the propriety of those provisions). In short, liability under section 396-r hinges on whether a business can accurately predict whether some future event (such as a bad storm) will affect some undefined market and make a contemplated price hike illegal. New York should not—and cannot constitutionally—punish businesses for putting their trust in the wrong meteorologist.

It is true that section 396-r nods in the direction of the common law of unconscionability. But the statute remains unconstitutionally vague because its approach to unconscionability is unmoored from that term’s common-law roots. Traditionally, “the doctrine of unconscionability requires some showing of ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” *Carvel Corp. v. Rait*, 117 A.D.2d 485, 490, 503 N.Y.S.2d 406 (2d Dep’t 1986). Section 396-r departs from this tradition by permitting NYAG to establish liability without proof of either element. See N.Y. Gen. Bus. Law § 396-r(3)(a).³

² *E.g.* Ala. Code § 8-31-3; 2020 Alaska Sess. Laws ch. 10, § 26; Ark. Code § 4-88-303(a)(1); Cal. Penal Code § 396(b); Conn. Gen. Stat. § 42-230; D.C. Code § 28-4102; Del. Declaration of a State of Emergency § 9 (Mar. 12, 2020); Ga. Code §10-1-393.4(a); Haw. Rev. Stat. § 127A-30(a); Kan. Stat. Ann. §50-6,106(b)(2); Ky. Rev. Stat. § 367.374(1)(a); La. Rev. Stat. § 29:732(A); 2020 Md. Laws ch. 13, § 1(a)(2); Me. Rev. Stat. Ann. tit. 10, § 1105(2); Mich. Executive Order No. 2020-18 § 2; Minn. Emergency Executive Order 20-10 § 1; Miss. Code §75-24-25(2); N.J. Rev. Stat. § 56:8-108; N.Y.C. Rules, tit. 6, § 5-42 (June 26, 2020); Okla. Stat. Ann. tit. 15, § 777.4(A); Or. Rev. Stat. §401.965(5); 73 Pa. Stat. § 232.4(a); Utah Code Ann. §13-41-101(1)(b); Wis. Stat. §100.305(2); W. Va. Code §46A-6J-3.

³ To be sure, the First Department has rejected a vagueness challenge to section 396-r, but the decision is doubly flawed. First, it improperly applied “a relaxed-vagueness standard” of scrutiny. *Quality King Distribs.*, 173 N.Y.S.3d at 237. But a more exacting standard is required because there is significant “opprobrium and stigma” attached to being labelled a price gouger, see *Reno v. ACLU*, 521 U.S. 844, 872 (1997), and because the “statute is capable of reaching expression sheltered by the First Amendment,” *VIP of Berlin*, 593 F.3d at 186 (internal quotation marks omitted). *Cf. Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017) (holding that New

II. The Proposed Rules Exceed NYAG’s Statutory Authority, Do Not Cure the Statute’s Infirmities, and Are Otherwise Misguided.

Given the vagueness problems plaguing section 396-r, the best use of NYAG’s rulemaking authority would have been to supply entities regulated by the section with clear, evidence-based guidance interpreting the statutory text and resolving uncertainty. Instead, the proposed rules exceed NYAG’s authority by attempting to impose extra-statutory presumptions that would improperly put the thumb on the scale in NYAG’s favor. They engage in unconstitutional policymaking by adopting economic theories not adopted (or even hinted at) by the Legislature. They add to the statute’s vagueness problem by introducing new, undefined concepts like “market share.” They arbitrarily and selectively import—then misapply—antitrust principles. And even if they are lawful, they are often unworkable.

We provide more specific comments on the individual Proposed Rules below.

A. Proposed Rule 600.6

This proposed rule would create a rebuttable presumption of “gross disparity” for price gouging for the “sale of an essential product [during an disruption] at a price that is greater than 10% of that essential products pre-disruption price.” Proposed Rule 600.6. Although API supports guidance that would allow businesses to know in advance how to avoid liability, the proposed “presumptive case of a gross disparity” for price increases above 10% is unlawful and unworkable.

First, the proposed 10% presumption exceeds NYAG’s regulatory authority. Section 396-r assigns to the “court[s],” not to NYAG, the determination “[w]hether a price is unconscionably excessive.” N.Y. Gen. Bus. Law § 396-r(3). And to assist courts in this determination, the statute contains a list of factors to be considered by court, *id.* § 396-r(3)(a), including a list of evidence for establishing a prima facie case, *id.* § 396-r(3)(b).

NYAG may “effectuate and enforce” these factors and statutory presumptions, *id.* § 396-r(5), but this delegation of authority is not broad enough to permit NYAG to create new ones. See *Kahal Bnei Emunim v. Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991) (“[A]n administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute.”). That is, because “the Legislature has explicitly enumerated

York surcharge ban regulated speech). Second, under any standard, the court’s review was unduly deferential. It is true, as the court observed, that the Legislature need not supply “impossible standards of specificity” or precise “quantitative metric[s] for ascertaining whether a given price is unconscionably excessive or unconscionably extreme.” *Quality King Distribs.*, 173 N.Y.S.3d at 237. But that observation is beside the point because, as explained in the body text, the statute fails to supply *any* meaningful guidance as to its application—a deficiency NYAG implicitly acknowledges with its attempts to patch those holes through regulation.

the factors to be considered by the” courts, NYAG may not add to them. *In re Tze Chun Liao v. N.Y. State Banking Dep’t*, 74 N.Y.2d 505, 510 (1989). Indeed, in the price-gouging statute specific to milk, section 396-rr, agency authority is explicitly tied to a percentage increase in the price of the product, see N.Y. Gen. Bus. Law § 396-rr(2)—showing that, “had the Legislature intended” to introduce a presumption based on percentage increases, “they knew how to engrave it in statutory form.” *In re Tze Chun Liao*, 74 N.Y.2d at 510. NYAG may not “add substantially” to its powers in a manner “not contemplated or authorized by the Legislature.” *Id.*

Second, even if the creation of new rules were authorized by statute, that authorization would amount to an unconstitutional delegation of the Legislature’s policy-making function under the four-part *Boreali* test. See *Boreali v. Axelrod*, 71 N.Y.2d 1, 11–14 (1987).

The 10% figure is a “value judgment[]” for the legislature to make, *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 698 (2014); see *Trenton Potteries*, 273 U.S. at 398 (explaining that determining whether a certain price is reasonable involves a value-laden policy judgment). NYAG appears to concede as much by attempting to justify its rule as consistent with the *legislative* 10% presumptions of some other States, see Proposed Rule 600.6 at 18, 19–20 (citing out-of-state statutes with 10% presumptions). For good reason, then, a previous NYAG administration asked the *legislature* to adopt a *statutory* presumption based on percentages.⁴

Furthermore, “this is not a case in which the basic policy decisions underlying the challenged regulations have been made and articulated by the Legislature.” *N.Y. Statewide Coal.*, 23 N.Y.3d at 700 (cleaned up). That is, the Legislature in section 396-r took no position on how much of a price increase would amount to a “gross disparity.” “Devising an entirely new rule that significantly changes” the approach to proving a prima facie case “without legislative guidance” is therefore exercise in “the choosing of ends, or policy-making.” *Id.* at 700.

In addition, “inaction on the part of the State Legislature” to update the statute to include a specific percentage figure (as the milk-price-gouging statute does) constitutes additional evidence that” the proposed rule “amount[s] to making new policy, rather than carrying out preexisting legislative policy.” *Id.*; see, e.g., 2006 N.Y. A.B. 10722 (failed bill containing a presumption based on a 25% increase).

And although price-gouging is unquestionably a matter of economics, “no special expertise or technical competence in the field of [economics] was involved in the

⁴ NYAG, *Spitzer Authors Bill To Strengthen Price Gouging Law*, <https://ag.ny.gov/press-release/2006/spitzer-authors-bill-strengthen-price-gouging-law> (Jan. 10, 2006).

development of the” proposed rule, see *Boreali*, 71 N.Y.2d at 13–14; e.g., Proposed Rule 600.6 at 8 (describing NYAG’s basis for expertise as its years of experience in enforcing the statute). Instead, NYAG simply borrowed from the legislative determinations of a handful of other States as to an acceptable figure and its staff’s assessment of data published by the U.S. Bureau of Labor Statistics. See Proposed Rule 600.6 at 18-20. In sum, NYAG’s narrow authority to “effectuate and enforce” section 396-r, N.Y. Gen. Bus. Law § 396-r(3), “cannot be construed to encompass the policy-making activity at issue here without running afoul of the constitutional separation of powers doctrine,” *Boreali*, 71 N.Y.2d at 14. Indeed, demonstrating that the rule is a matter of policy judgment, NYAG suggests that the rule reflects “community understanding” of what constitutes a gross disparity. Proposed Rule 600.6 at 21.

Third, any assignment to NYAG of the power to create presumptions in its favor (and against defendants) would raise serious due-process concerns. Under NYAG’s reading of section 396-r, the Attorney General is authorized both to promulgate a rule that creates a presumption of liability and to prosecute businesses under that presumption. This effectively “dual position as accuser and decisionmaker” is constitutionally impermissible. *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016).

Fourth, there is no rational basis for setting the presumption at 10%. NYAG asserts that there is convergence or “community understanding” of the illegitimacy of more than 10% price increases,” but points to the presumptions in only 10 States and New York City. Proposed Rule 600.6 at 20.⁵ As NYAG recognizes, even more States—twenty, to be precise—do not consider presumptions to be appropriate, leaving the issue for the courts. *Id.* at 20. And others set their presumptions well above the 10% threshold. *Id.* Moreover, those 10 States have price-gouging statutes that apply during short-term disruptions declared by the government, not for periods that could last years, such as “war.” See N.Y.

⁵ Even that figure overstates the prevalence of a rigid 10% rule. Unlike the proposed rule, some States permit price increases beyond 10% that are not attributable to cost increases. E.g., Ky. Rev. Stat. §367.374(1)(c)(4) (permitting increases that are “consistent with fluctuations in applicable commodity, regional, national, or international markets, or seasonal fluctuations”). Unlike the proposed rule, some States apply their 10% rule only to retail and not to other levels of the distribution chain. E.g., Utah Code Ann. §13-41-201(1)(b) (prohibiting excessive prices for “good[s] or service[s] at retail”); Okla. Stat. Ann. tit. 15, § 777.4 (“This section shall not apply to growers, producers, or processors of raw or processed food products, except for retail sales of such products to a consumer.”). And, contrary to NYAG’s representation, Kentucky does *not* use 10% “as the measure of what constitutes presumptive price gouging.” Proposed Rules at 9. Instead, Kentucky law provides that a price *never* “violate[s] this subsection if it is . . . [t]en percent or less above the price prior to the [emergency] declaration.” Ky. Rev. Stat. § 367.374(c). Whether a price increase above 10% violates the statute remains “a question of law” for the court, with no presumption of unlawfulness. *Id.* § 367.374(d).

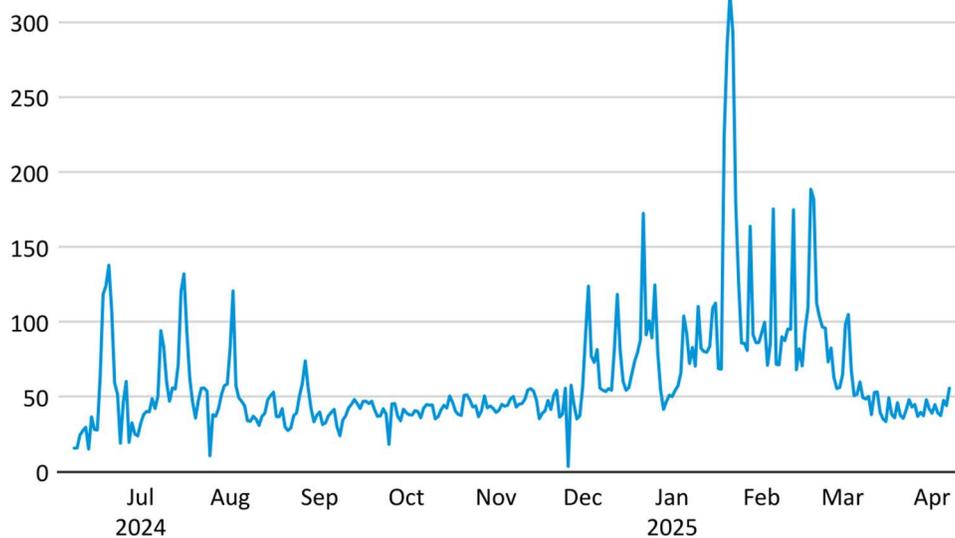
Gen. Bus. Law § 396-r(2). There is no “societal convergence” around the idea that prices cannot increase more than 10% over a period of many months, let alone many years.

NYAG’s conclusion that a correlation between disruptive events and 10% or greater price changes in Bureau of Labor and Statistics data is no more rational. See Staff Report at 36. The Staff Report notes that price increases greater than 10% often correlate with disruptions in markets, some of which may be considered exceptional events under § 396-r. *Id.* at 32. But that merely shows that a normal response to a market disruption includes price increases, not that sellers are gouging customers.

There is no “community understanding” that the price of a commodity should not change by more than 10% given changes in supply and demand. Look, for example, to New York’s own pricing of electricity from hydroelectric plants owned by the New York Power Authority, which is wholly owned by the state and whose trustees are appointed by the governor with the advice and consent of the senate. These are the day-ahead prices charged for power at 5 p.m. by the Authority’s St. Lawrence Generator, its second largest hydro plant:

Day-Ahead Generator Price at 5 P.M. for the NYPA St. Lawrence Generator

Generator Price (Dollars)



Source: NYISO

The prices New York itself charged for electricity changed by a factor of more than 500% over a span of ten months, and often within a span of days. The NYAG has suggested that this is an inapt example because wholesale electricity prices are allowed to fluctuate as part of a highly regulated market, with protection for retail purchasers that are designed to ensure that the prices are “just and reasonable.” Staff Report at 27-28. But that only

proves the point, high price fluctuations are recognized as part of a highly regulated market that NYAG asserts “seek to accomplish the same goal via different means in the price gouging law: preventing unfair pricing.” *Id.* at 28. There frankly is no “community understanding” that 10% increases are unconscionable.

NYAG also asserts that the 10% rule facilitates “self-enforcement” and will make compliance “easier.” Proposed Rule 600.6 at 17. But that assertion presupposes, incorrectly, that businesses will have no difficulty figuring out the starting point of “the abnormal disruption of the market.” § 396-r(3)(c). As already explained, because the starting point is extremely difficult to pin-point *ex ante*, businesses will have no way of identifying the moment “immediately prior to the onset” of that disruption. See *id.* It is similarly unclear how to determine when a disruption *ends*. This uncertainty might only work to deter businesses from providing vital goods and services when they are needed most, while encouraging arbitrary and selective enforcement by NYAG. If NYAG truly considers it “important” to provide “guidance” to “tens of thousands of small retailers,” see Proposed Rule 600.6 at 17, it should start by giving those retailers meaningful guidance about identifying the start of a “period of abnormal disruption of the market,” N.Y. Gen. Bus. Law § 396-r(1); *cf.* n.2, *supra* (listing the many jurisdictions where a price-gouging law is triggered only by an emergency declaration).

In any event, the easy administrability of *some* fixed figure does not justify the imposition of the 10% figure. And NYAG’s argument that the figure is warranted because a 10% price increase “has a *meaningful* effect” on consumers, Proposed Rule 600.6 at 21 (emphasis added), falls far short of establishing that the increase marks a “*gross* disparity” from an earlier price or “grossly exceed[s]” the price of comparable products, see N.Y. Gen. Bus. Law § 396-r(3)(b)(i)–(ii) (emphases added); *cf.* *Negligence*, Black’s Law Dictionary (11th ed. 2019) (explaining that “gross negligence” means “*very great* negligence” (emphasis added)).

It is no surprise, then, that cases in which sellers were found to have violated section 396-r through “unconscionably extreme” prices involved price increases well above 10%. Consider, for example, *Quality King Distributors*. There, the price increases held to be “unconscionably excessive” ranged from 33% to 85%. See 173 N.Y.S.3d at 81. In *People ex rel. Spitzer v. My Service Center, Inc.*, the unlawful price increases were between 31% and 48%. See No. 06/21157, 836 N.Y.S.2d 487, at *2 (Sup. Ct. Jan. 17, 2007). In *People ex rel. Vacco v. Beach Boys Equipment Co.*, the court affirmed a decision holding unlawful “a price increase of 100%.” 709 N.Y.S.2d 729, 731 (4th Dep’t 2000) (emphasis added). And in still other cases, prices found unconscionable were *three or four times* the actual market value. *State of New York v. Strong Oil Co.*, 105 Misc.2d 803, 824 (Sup. Ct. 1980) (collecting cases). By contrast, price increases of 10% or less have been found unlawful only when they were “obtained through unconscionable means.”

Beach Boys, 709 N.Y.S.2d at 731 (quoting *People ex rel. Abrams v. Two Wheel Corp.*, 530 N.Y.S.2d 46, 50 (1988)).⁶

B. Proposed Rule 600.8

This proposed rule purports to limit the meaning of the statutory phrase, “additional costs not within the control of the defendant.”

Proposed Rule 600.8 suffers from many of the same problems as Proposed Rule 600.5. The proposed rule purports to limit the availability of—and the evidence that may be used to support—the statutory “additional costs” defense in section 396-r(3)(c)(2). But NYAG lacks the power to make a defense more difficult to satisfy. See *Freitas v. Geddes Sav. & Loan Ass’n*, 63 N.Y.2d 254, 264 (1984) (it is impermissible to impose a “more stringent test . . . than would be authorized by the statute under which the regulations were promulgated”). NYAG gets no further by limiting the clear statutory defense under the guise of “guidance,” Proposed Rule 600.8 at 20; see *Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004) (no deference to an administrative agency is due “where the question is one of pure statutory reading and analysis” (internal quotation marks omitted)). NYAG has no power to limit a seller’s reliance on “index pricing” when such pricing is customary in an industry, see Proposed Rule 600.6(e). because those prices will necessarily reflect “the price at which the same or similar goods . . . [are] obtainable in the trade area”—and are therefore lawful, see N.Y. Gen. Bus. Law § 396-r(3)(b)(ii). And NYAG’s arrogation of the power to determine the availability of defenses for cases it prosecutes again impermissibly encroaches on the Legislature’s policy-making function and implicates the federal and state Due Process Clauses.

API also notes that “replacement costs” were omitted from the proposed definition of “[a]dditional costs not within the control of the defendant.” In that respect, Pennsylvania and Kentucky laws provide a template that NYAG should follow. See Ky. Rev. Stat. § 367.374; 73 Pa. Stat. § 232.4(c) (“The provisions of this section shall not apply if the increase in price is due to a disparity that is substantially attributable to additional costs that arose within the chain of distribution in connection with the sale of consumer goods or services, including replacement costs.”).

Moreover, “costs directly attributable to . . . the specific good,” see Proposed Rule 600.6(b), will in many markets be impossible to calculate. In a market involving refined products, for example, the product is commingled in tanks, making it impossible to determine the acquisition cost “directly attributable” to a particular gallon sold out of the

⁶ Because these decisions involved short-term price increases, they had no occasion to discuss the effect seasonal variations in pricing might have on the analysis. But any standard for unconscionability must be linked to the length of the disruption (which, under Section 396-r, could be years), and consider seasonality and other changes in pricing that are unrelated to unconscionability.

tank. We appreciate that the NYAG has now proposed to that “where essential products are stored prior to sale in such a fashion that it is not feasible to determine the price at which any unit of the good was purchased, a seller may determine the price at which a given unit of the good was purchased for purposes of this rule by assuming that the good produced or acquired first are the first to be sold,” Proposed Rule 600.6(f), but that does not answer the question of which cost are “directly attributable” to a particular gallon. Indeed, the NYAG’s assertion that there is a “global consensus” of using the “first in, first out method,” only demonstrates that there are multiple means for determining what costs are directly attributable to the production, purchase, storage, distribution and sale of a product and the Legislature evinced no intent to authorize the Attorney General to decide what evidence a defendant could present.

C. Proposed Rule 600.7

This proposed rule would expand the price gouging statute to cover products that are new to the market when the disruption begins and create standards for determining whether the price for such products is “unconscionably excessive.”

The subsections of Proposed Rule 600.7 suffer from the same defect: they purport to alter the language of the statute. They would expand the scope of the statute to new products, creating a whole cloth new category of products that were not sold prior to the disruption and making them subject to the statute. But section 396-r clearly only applies to essential products that were sold prior to the disruption. For example, section 396-r(i) refers to “such good or services” that “were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market.” Similarly, section 396-r allows a defendant to rebut a prima facie case with evidence that “the amount charged preserved the margin of profit that the defendant received *for the same good or services* prior to the abnormal disruption.” Proposed Rule 600.7’s expansion to cover brand new products that were not sold prior to the disruption has no basis in the statute.

Subsection 600.7(a) also worsens the vagueness problem that plagues the statute. It purports to compare the price of a “new essential product” to “comparable essential products.” Subsection (a)(2) says that a “comparable essential product” is one that the (1) “seller used as a point of comparison when determining or justifying the price for the new essential product,” (2) “a good or service whose design or technology the seller adapted, or (3) a good or service that, if it possessed the same price as the essential product, would be treated by a reasonable person in the position of the buyer and an acceptable substitute.” All of these are subjective judgments that cannot be determined with any certainty prior to potential enforcement action. Moreover, they will stifle innovation, especially in a triggering event. Consider the first COVID vaccine. See Proposed Rule 600.7 at 17 (asserting that there were “complaints about price gouging on

... vaccinations” during the pandemic). What product would be considered “comparable”? The vaccine for another disease? Some less effective treatment for COVID? The Rule would lock the price for such an important new innovation at 10% greater than the cost of a vaccine that was developed decades ago. That would stifle investment in such important innovations.⁷

D. Proposed Rules 600.3 and 600.4

Proposed Rules 600.3 and 600.4 attempt to clarify how the NYAG can prove a violation based on “unfair leverage or unconscionable means,” but in doing so it unlawfully expands liability beyond what the Legislature contemplated.

The statute clearly states that “whether a price is unconscionably excessive is a question of law for the court” and it directs *the court* to consider, among other things, whether “there was an exercise of unfair leverage or unconscionable means.” § 396-r(3), (3)(a)(ii). Proposed Rules 600.3 and 600.6 would strip this determination from the court and create a presumption of unfair leverage if there is *any* price increase (no matter how small) from a seller that holds certain market shares. Proposed Rule 600.4(a)(c). The statute is focused on prices that are “unconscionably excessive” and “unconscionably extreme.” § 396-r(3). The NYAG cannot rewrite it to prohibit any price increase at all from certain sellers, particularly during a market disruption that will naturally affect prices. See *also* pages ___-___ *supra* (discussing the traditional standards for evaluating “unconscionable” prices).

Of the proposed rules, Proposed Rule 600.4 is the most clearly unlawful. *First*, the proposed rule introduces new presumptions not included in—and not permitted by—the statute. See *Kahal Bnei Emunim*, 78 N.Y.2d at 204; *In re Tze Chun Liao*, 74 N.Y.2d at 510. It presumes unfair leverage for any price increase by certain actors.

Second, the market-share thresholds violate the separation of powers. The thresholds appear to be drawn not from section 396-r, but from scattershot economic literature NYAG has no special competency to evaluate. See Proposed Rules at 24–25. For example, NYAG asserts that a 30% market share (or 10% share in “concentrated market[s]”) is indicative of “pricing power,” Proposed Rule 600.4 at 16, but that assertion has no basis in the statute, and NYAG lacks the economic expertise to make the necessary evaluation. The proposed rule, then, is not a mere regulatory decision, “but rather a policy decision and value judgment about where to draw a line.” *Stevens v. N.Y.*

⁷ The NYAG suggests innovation would not be stifled because “R&D costs are fully recoverable along with the profit margin of the comparable essential product,” Proposed Rule 600.7 at 27. But that is not how the Proposed Rule works. The Proposed Rule says that the price of a new essential product is excessive if it is “more than 10% greater than the benchmark price,” Proposed § 600.7(c)(1), and the benchmark price is “the price at which a comparable essential product was” sold in the area (regardless of profit margins).

State Div. of Crim. Just. Servs., 169 N.Y.S.3d 1, 14 (1st Dep’t 2022). Put differently, with no “legislative guidelines at all for determining” appropriate market share, NYAG is “acting solely on its own ideas of sound public policy and [is] therefore operating outside its proper sphere of authority.” *Boreali*, 71 N.Y.2d 1 (1987) (cleaned up).

Third, the proposed rule exacerbates the statute’s vagueness problem. The proposed rule introduces the non-statutory concepts of “market share,” the “Herfindahl-Hirshman Index,” and “relevant market.”⁸ Proposed Rule 600.4(2)–(3). But the rules do not explain how to calculate the relevant market or market share. The Proposed Rule purports to draw from antitrust law, see Proposed Rule 600.4 at 19 (citing and discussing antitrust concepts and authorities), but those concepts are never explicitly incorporated in the section 396-r. And the arbitrary incorporation of antitrust law into the meaning of “unfair leverage” is especially unusual given that NYAG’s position in Proposed Rule 600.3 is that the term invokes the common law of unconscionability, not the common law of restraint of trade (from which antitrust law is derived). See Proposed Rules at 21.

Fourth, to the extent that the 30% and 10% market share thresholds *are* drawn from antitrust law, the thresholds reflect a mistaken understanding of that law. NYAG asserts that the thresholds represent a “recognized market share threshold that, in ordinary market circumstances, presents a threat of undue market concentration. *Id.* at 18-19. But the Supreme Court has held that “a market share” of 30% “alone [i]s insufficient as a basis to infer market power”—that is, the power “to force a purchaser to do something that he would not do in a competitive market” such as pay inflated prices. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 27 (1984). New York cases are in accord. *E.g.*, *New York ex rel. Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 873 (E.D.N.Y. 1993) (“In this Court’s examination . . . 39% share is below that which has been deemed sufficient to confer market power in any previous decision.”). Indeed, regardless of the level of concentration of the market, “[c]ourts have consistently held that firms with market shares of less than 30% are presumptively *incapable* of exercising market power.” *Union Carbide Corp. v. Montell N.V.*, 27 F. Supp. 2d 414, 417 (S.D.N.Y. 1998) (emphasis added). Yet, under the proposed rule, a firm that had a 10% share and competed with 90 firms each with a share of 1% would have market power (because, without a 10% share, none of those 90 firms satisfy the Proposed Rule’s definition of “significant competitor”), rather than a competitor in an intensely competitive market. No competent economist would support such a definition of market power. The proposed thresholds turn antitrust law on its head.

⁸ The Proposed Rule credits itself with taking these terms from “recognized definitions from competition law,” Proposed Rule 600.4 at 19, but points to no indication that the Legislature considered or adopted these terms, because it did not.

NYAG’s justifications for the thresholds do not withstand scrutiny. In support of the 30% threshold, NYAG cites a decision of the Supreme Court that discusses the threshold for presuming that the effect of a merger “may be substantially to lessen competition” in violation of section 7 of the Clayton Act. See *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 355 (1963). But that provision that “does not require proof that [the] merger . . . will cause higher prices,” *Hosp. Corp. of Am. V. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986), rendering section 7 caselaw wholly irrelevant when it comes to interpreting and applying section 396-r, a price-focused provision.

And, in an attempt to justify the 10% threshold, the proposal explains that it had to pick something, so it arbitrarily picked 10%. See *id.* at 22 (“A threshold of some sort was necessary to avoid discouraging new entrants in highly concentrated markets . . . [a] 10% market share pre-disruption was selected as a middle ground that would avoid sweeping in new entrants while still recognizing the price gouging risks that arise from market concentration . . .”). The literature that it relies on to support the use of the Herfindahl-Hirschman Index says nothing about this 10% threshold.

E. Proposed Rule 600.9

Proposed Rule 600.9 is a misguided attempt to rewrite section 396-r(2). Section 396-r(2) provides that the prohibition against price gouging applies only “when the product sold was located in the state prior to the sale.” N.Y. Gen. Bus. Law. § 396-r(2). In other words, the prohibition does *not* apply to transactions where the product was imported into New York as part of the sale. NYAG’s purported revision of section 396-r to extend to *all* instances where the “ultimate sale of goods . . . takes place in New York,” including imports, see Proposed Rule 600.9 at 19, conflicts with the statute and is entitled to no deference. See *Belmonte*, 2 N.Y.3d at 566. And although it is true that one lower court has adopted NYAG’s interpretation, this interpretation has not been addressed by higher courts and remains subject to litigation. See *In re Tyson Foods, Inc.*, 218 A.D. 3d 424 (2023) (affirming issuance of subpoena duces tecum to investigate price gouging complaints, but declining to reach the merits). It is therefore premature to treat NYAG’s interpretation as judicially sanctioned. See Proposed Rule 600.9 at 19. And, to the extent NYAG’s interpretation would extend section 396-r to transactions that take place entirely out-of-state (even if the product is later imported into New York), the law would violate the Commerce Clause’s prohibition against extraterritoriality. See *Ass’n for Accessible Medicines v. Frosh*, 887 F.3d 664, 670 (4th Cir. 2018) (holding that Maryland’s price-gouging statute, which “regulate[d] the prices charged for [certain goods] in out-of-state transactions,” violated the Commerce Clause).

F. Proposed Rule 600.5

Proposed Rule 600.5 would determine pre-disruption price for sellers who use dynamic pricing by deploying one of three methods of comparing benchmark prices to the

scrutinized sale. Proposed Rule 600.5(b). The proposed rule’s legal infirmities are by now familiar. Like other proposed rules, Proposed Rule 600.5 unlawfully “creates out of whole cloth” a new rule of liability for sellers who use dynamic pricing. *Vapor Tech. Ass’n v. Cuomo*, 118 N.Y.S.3d 397, 402 (Sup. Ct. 2020). It once again exacerbates the vagueness problem by introducing new, non-statutory terms—“dynamic pricing” and “median price”—that are not defined and could bear any number of meanings. It creates out of whole cloth new terms, like “benchmark date,” and “immediately prior” that are absent from the statute. And it introduces an arbitrary 30-day lookback period that fails to account for seasonality and assumes, incorrectly, that prices move equally quickly for all products in all markets.

At the very least, the more detailed description of “dynamic pricing” in the Regulatory Impact Statement, see Proposed Rule 600.5 at 18-19, should have made its way into the text of the proposed rule. But even that description has its shortcomings. According to NYAG, “dynamic pricing [is] a term for pricing schemes that adjust the price of a good or service on a sale-by-sale basis in response to independent variables” *Id.* But that description applies to essentially *all* sellers given that essentially all sellers (and certainly those in traditional commodity markets) adjust their prices based on independent variables.

* * *

For the reasons stated above, we respectfully request that NYAG reconsider its proposed rules so that they provide greater clarity about the operation of section 396-r without attempting to insert unlawful and unworkable presumptions that would only harm businesses and deter innovation. If you have any questions, please reach out to me.

Sincerely,



Michael S. Giaimo
Northeast Region Director
API Northeast Region
11 Beacon Street, Suite 1230
Boston, Massachusetts 02108
giaimom@api.org

**Before the
STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
New York, NY 10005**

In the Matter of)
Price Gouging) I.D. Nos. LAW-06-25-00005-P, LAW-06-
) 25-00006-P, LAW-06-25-00007-P, LAW-
) 06-25-00008-P, LAW-06-25-00009-P,
) LAW-06-25-00010-P, LAW-06-25-
Via email to stopillegalprofiteering@ag.ny.gov) 00011-P, LAW-06-25-00012-P

COMMENTS OF CTIA

On behalf of the U.S. wireless industry, CTIA¹ submits the following comments to urge the Attorney General to exempt wireless services from any regulations adopted in response to the above-referenced rulemaking on laws governing price gouging in New York.²

I. INTRODUCTION AND SUMMARY.

Thanks to wireless providers’ network investment, wide-area coverage, and the highly competitive environment in which they operate, New York wireless consumers get great prices to connect to family, friends, and the internet at unprecedented speeds whether they are at home

¹ CTIA – The Wireless Association® (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless providers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. CTIA represents a broad diversity of stakeholders, and the specific positions outlined in these comments may not reflect the views of all individual members. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² See *Rulemaking on Laws Governing Price Gouging in New York*, OFF. OF THE N.Y. STATE ATT’Y GEN., <https://ag.ny.gov/rulemaking-laws-price-gouging> (last visited Apr. 14, 2025) (Proposed Rules 600.1, 600.2, and 600.10: Definitions and severability; Proposed Rule 600.3: Unfair leverage examples; Proposed Rule 600.4: Unfair leverage of market position; Proposed Rule 600.5: Pre-disruption price determination; Proposed Rule 600.6: Gross disparity threshold; Proposed Rule 600.7: New essential products; Proposed Rule 600.8: Cost definition and allocation methods; Proposed Rule 600.9: Geographic scope).

or on the go. Prices for calling, texting, and broadband have been declining steadily for many years, regardless of inflation in recent years that has led to rising prices elsewhere in the economy. Governor Hochul affirmed that “affordable high-speed internet isn’t just about convenience – it’s about ensuring every New Yorker can participate fully in our modern economy and society.”³ Needlessly regulating wireless providers hinders the ongoing efforts to invest that keep making Governor Hochul’s vision a reality. Accordingly, to best promote the availability of faster broadband at lower prices, the Attorney General should exclude wireless providers from the scope of any regulations adopted in this proceeding and, to the maximum extent possible, from the existing anti-price gouging regulations.⁴

Wireless providers connect people across New York at low prices. There is simply no reason to subject the wireless industry to regulations targeted at “price gouging” – whatever the opposite of gouging is, that is what wireless does. Rather than helping consumers, regulating wireless providers’ pricing would only create needless compliance costs that could hinder the infrastructure investment that leads to more coverage, faster networks, and lower prices.⁵ And further, attempting to regulate wireless rates is expressly and implicitly preempted by the federal Communications Act of 1934, as amended (“Communications Act”) and pursuant to the dormant

³ Press Release, Governor Kathy Hochul, Making Broadband More Affordable: Governor Hochul Announces More Than \$13.1 Million in New Broadband Awards to Secure Long-Term, Low-Cost Access for Thousands of New Yorkers in Public and Affordable Housing (Dec. 19, 2024), <https://www.governor.ny.gov/news/making-broadband-more-affordable-governor-hochul-announces-more-131-million-new-broadband>.

⁴ CTIA does not take a position on the merits or lawfulness of application of the regulations to other industries.

⁵ New York’s existing, ill-considered attempt at broadband rate regulation has already caused one wireless provider to cease offering wireless home broadband in the state. *See* Iskra Petrova, *AT&T Bows Out of Huge Home Internet Market Area as New Law Takes Effect*, PHONE ARENA (Jan. 17, 2025), https://www.phonearena.com/news/at-t-bows-out-of-huge-home-internet-market-area-as-new-law-takes-effect_id166734.

commerce clause. Accordingly, New York should heed the federal bipartisan consensus against wireless rate regulation and exempt the wireless industry from any price gouging regulations it adopts.

II. THE HIGHLY COMPETITIVE WIRELESS MARKETPLACE DELIVERS LOW PRICES FOR CONSUMERS, AND NEEDLESS REGULATION WOULD SLOW THE INVESTMENT THAT FUELS STILL-LOWER PRICES.

The wireless industry is delivering unparalleled price competition and quality mobile and fixed wireless solutions for New Yorkers. In this environment, the regulations contemplated in this proceeding are wholly unnecessary. Worse, they will impose wasteful compliance costs that can detract from the investment that keeps prices going down and quality going up, even as wireless demand continues to rise. To avoid that counterproductive outcome, the Attorney General should exempt wireless services from any final rules in this proceeding.

A. Wireless Competition Ensures Low Prices Without the Need for Regulation, Including in Times of Market Disruption.

The U.S. wireless marketplace delivers unprecedented investment, innovation, and competition, resulting in next-generation networks and competitive prices for American consumers. The per megabit price of wireless broadband in nominal terms has declined by 97 percent in the past decade (and even more when adjusted for inflation), and wireless rates went down from 2022 to 2023 while inflation led prices across the economy to continue to go up.⁶ As Compass Lexecon has concluded, “the wireless industry exhibits strong competitive performance as it features high levels of investment, service improvements (in terms of speed and coverage),

⁶ 2024 Annual Survey Highlights, CTIA, at 8 (Sept. 10, 2024), <https://api.ctia.org/wp-content/uploads/2024/09/2024-Annual-Survey.pdf> (“CTIA 2024 Annual Survey Highlights”).

declining prices, escalating usage, and expanding competition into new areas.”⁷ Further, according to the Multicultural Media, Telecom & Internet Council, a leading public interest technology organization, wireless’s “varied and attractive pricing tiers” are among the reasons that wireless is “a significant factor in bridging the digital divide and providing underserved communities with the 21st century tools they need for advancement.”⁸

Wireless providers are bringing the competitive zeal of the mobile marketplace to home broadband. 5G home broadband—also called 5G Fixed Wireless Access (“FWA”)—is the fastest-growing type of broadband connection in the nation. In 2023, FWA accounted for 104 percent of the approximately 3,522,000 net broadband additions (inclusive of both wireline losses and fixed wireless additions).⁹ FWA is becoming available in more communities as networks expand, including more than 94 million U.S. households in 2023—more than doubling the number of households in the previous year.¹⁰

In the highly competitive wireless marketplace, providers consistently deliver exceptional pricing to consumers, obviating any need for price gouging regulation, including in times of market disruption. Even during the unprecedented global pandemic that drove up prices across the economy and led to record demand for broadband, wireless prices kept falling, as illustrated by the chart below.

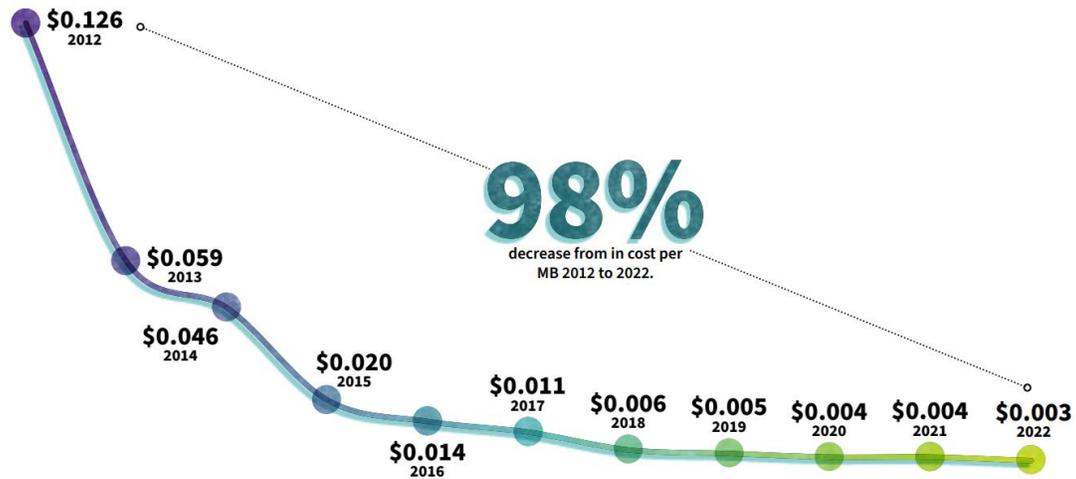
⁷ Bryan Keating, *An Economic Analysis of Mobile Wireless Competition in the United States*, COMPASS LEXECON, at 4 (Dec. 11, 2023), https://api.ctia.org/wp-content/uploads/2023/12/CL_Dec-2023.pdf (“Compass Lexecon Report”).

⁸ *Wireless in Communities of Color: Bridging the Digital Divide*, MULTICULTURAL MEDIA, TELECOM & INTERNET COUNCIL, at 6 (2022), <https://www.mmtconline.org/wp-content/uploads/2022/07/Wireless-in-Communities-of-Color-July-2022.pdf>.

⁹ *1Q 2024 Research Notes: Actionable Research on the Broadband, Media & Entertainment Industries*, LEICHTMAN RESEARCH GROUP, at 4 (2024), <https://leichtmanresearch.com/wp-content/uploads/2024/03/LRG-Research-Notes-1Q-2024.pdf>.

¹⁰ Comments of CTIA, FCC GN Docket No. 24-119, at 7 (dated June 6, 2024) (“CTIA Communications Marketplace Comments”).

Figure: Cost Per Megabyte of Wireless Data



Nor would the structure of wireless pricing allow for abrupt state- or locality-specific price increases, which occur in typical price gouging scenarios like an abrupt rise in generator prices after a hurricane.¹¹ A December 2024 report by the Federal Communications Commission (“FCC”), the expert agency that oversees the wireless industry, notes that “[m]obile service providers continue to offer nationwide pricing plans throughout their service areas.”¹² Nationwide pricing ensures that New Yorkers get the same benefit of great wireless pricing as all Americans, regardless of local circumstances.¹³

With more than 80 percent of the U.S. population having access to three or more 5G providers as of December 2023, according to FCC data, the highly competitive wireless

¹¹ *Price Gouging: Notice of Proposed Rulemaking, Proposed Rules 600.1, 600.2, 600.10*, OFF. OF THE N.Y. STATE ATT’Y GEN. LETITIA JAMES, ECON. JUST. DIV., at 9 (Feb. 2025) <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.1-600.2-600.3.pdf> (discussing that the Attorney General sought penalties and restitution for the sale of 100 generators sold by defendant at an increased price after Hurricane Gloria).

¹² *Communications Marketplace Report*, 2024 Communications Marketplace Report, FCC 24-136, ¶ 78 (rel. Dec. 31, 2024) (“*Communications Marketplace Report*”).

¹³ Wireless providers may apply taxes and fees to nationwide pricing plans to represent the individual state regulatory and other costs, such as state and local 911 and universal service charges.

marketplace also ensures that consumers can vote with their feet if a provider fails to offer prices that customers want, without need for government intervention.¹⁴ Wireless industry practices and FCC broadband disclosure requirements adopted on a bipartisan basis further ensure that consumers have all the information they need to make informed decisions regarding the wide variety of options available.¹⁵ In this environment, the contemplated regulations would not benefit New Yorkers.

B. Application of the Proposed Rules to Wireless Would Harm Broadband Investment, to Consumers' Detriment.

In addition to being unnecessary, application of rules at issue to wireless services would force providers to waste money and employee time on monitoring compliance, when those resources could be better spent continuing to invest in networks, which would strengthen the competition that drives low wireless prices.

Wireless is second-to-none when it comes to investment. Wireless providers have invested \$190 billion in their networks since 2018, including \$30 billion in 2023 alone.¹⁶ The nationwide rollout of 5G happened nearly twice as fast as 4G.¹⁷ A recent report identified that median download speeds quadrupled over the past seven years and doubled over the past three

¹⁴ *Communications Marketplace Report* ¶ 128, Fig. II.B.33; see also Compass Lexecon Report at 46-47 (observing that approximately 18 percent of mobile wireless customers change providers annually, demonstrating “competition in action”).

¹⁵ See *Consumer Code for Wireless Service*, CTIA (2020), <https://api.ctia.org/wp-content/uploads/2020/03/CTIA-Consumer-Code-2020.pdf>; 47 C.F.R. § 8.2 (requiring that all broadband consumers, including those using wireless services, have access to transparency disclosures and easy-to-understand labels that are designed to help them comparison shop for broadband plans); 47 C.F.R. § 64.2400, *et seq.* (truth-in-billing requirements).

¹⁶ CTIA 2024 Annual Survey Highlights at 5.

¹⁷ CTIA Communications Marketplace Comments at 10-11.

years.¹⁸ Thanks to ongoing wireless investment in 5G, CTIA projects that New York will enjoy \$123.8 billion in GDP growth and over 291,000 new jobs in the next decade.¹⁹

Every dollar spent on compliance with unnecessary regulatory requirements is one that cannot be spent on deployment or returned to consumers in the form of lower prices. Thus, regardless of whether wireless providers are ever at risk of noncompliance, imposing these regulations has real costs to providers – such as to outside counsel and contractors to monitor legal obligations – and the consumers they serve.

A patchwork of state pricing regulations would be particularly costly in the wireless context. As noted above, wireless providers typically price on a nationwide basis, less state and local fees. Thus, if the price gouging law were to apply, wireless providers would have to account for compliance costs as they establish pricing across their entire footprints. If New York's proceeding inspires a patchwork of state-by-state laws, wireless providers could be faced with dozens of discrete, costly legal analyses in the course of setting a single nationwide price.

The FCC does not regulate wireless pricing, reflecting the competitive wireless marketplace and the risks to investment that doing so would impose. The FCC decided decades ago that it would not apply traditional utility rate regulation to wireless voice.²⁰ As for broadband, despite regular swings of the FCC's regulatory pendulum between light-touch regulation or heavy-handed utility-style regulation, there is widespread bipartisan support for the

¹⁸ Compass Lexecon Report at 13.

¹⁹ *5G Economic Impact, New York*, CTIA, https://www.ctia.org/assets/5g-in-america/state-pdfs/CTIA_5GEconomicImpact_NewYork.pdf (last visited Apr. 14, 2025).

²⁰ *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1480, ¶ 179 (1994).

view that any such framework should not include regulation of pricing.²¹ The State of New York should follow the lead of the expert federal regulatory agency and bipartisan consensus in ensuring that its laws do not impose unnecessary and unjust rate regulation on wireless services.

III. REGULATION OF WIRELESS PRICING IS PREEMPTED BY FEDERAL LAW.

In addition to the policy reasons discussed above for not imposing pricing regulation on wireless services, doing so is unlawful under federal law. As detailed below, New York regulation of wireless pricing is barred by (1) express preemption of mobile rate regulation by the federal Communications Act; (2) implied preemption based on Congress and the FCC having occupied the field of wireless regulation; and (3) the dormant commerce clause doctrine, which precludes unreasonable state burdens on interstate commerce. Rather than impose the unnecessary expense on taxpayers of attempting to pursue unlawful regulations, New York should exempt wireless services if it chooses to move forward with this proceeding.

The Federal Communications Act Preempts Wireless Rate Regulation. Congress has expressly precluded the states from regulating the prices that wireless providers charge customers. Under the federal Communications Act, “no State . . . shall have any authority to regulate the . . . rates charged by any commercial mobile service or any private mobile service.”²² Courts have recognized that this bars any form of state pricing regulation of mobile wireless service.²³ “Commercial mobile service” includes wireless voice, and “private mobile service” includes wireless broadband and text messaging, so this statutory preemption applies to

²¹ See *Safeguarding and Securing the Open Internet et al.*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, 39 FCC Rcd 4975, 5172-73 ¶ 321 (2024), *rev'd*, *In re MCP No. 185*, 124 F.4th 993 (6th Cir. 2025); *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 370, ¶ 101 (2018).

²² 47 U.S.C. § 332(c)(3)(A).

²³ See, e.g., *WWC Holding Co. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007); *Gilmore v. Sw. Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 922 (N.D. Ill. 2001).

the fully array of wireless services commonly offered by CTIA members.²⁴ Thus, it would be unlawful for New York to apply either the contemplated regulations or its existing pricing regulations to wireless.

Federal Law Occupies the Field of Regulation of Key Aspects of Wireless, Including Price. Congress has occupied the field of regulation of many key aspects of wireless services, including price, leaving no room for the state regulation proposed here.²⁵ The essence of CTIA members' businesses is transmission via wireless spectrum, and the Communications Act establishes that allocation and regulation of the use of such spectrum is under complete federal control.²⁶ In addition, the Communications Act empowers the FCC to exercise broad regulatory authority over wireless services where Congress has deemed such regulation justified, and it has done that.²⁷ This includes authority to regulate the rates of "commercial mobile services" (e.g., wireless voice) if circumstances warrant²⁸ – which the FCC has recognized they do not. Further, Congress has determined that rate regulation is out of bounds for wireless broadband, as "the policy of the United States [is] . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."²⁹ In light of the pervasive and carefully measured federal regulatory scheme for key wireless issues such as spectrum and pricing, state regulation of the type that the proposals contemplate is preempted.

²⁴ See *In re MCP No. 185*, 124 F.4th at 993; *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling, 33 FCC Rcd 12075 (2018).

²⁵ See *Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Where Congress occupies an entire field, . . . even complementary state regulation is impermissible.").

²⁶ See 47 U.S.C. § 301 *et seq.*

²⁷ See *id.*; see also, e.g., 47 C.F.R. Chapter 1, Subchapter B, Parts 20 and 22 (laying out rules for commercial mobile services and public mobile services).

²⁸ See 47 U.S.C. §§ 160, 201, 202, 332(c)(1).

²⁹ 47 U.S.C. § 230(b)(2).

Applying the Regulations to Wireless Would Violate the Dormant Commerce Clause.

The Commerce Clause of the U.S. Constitution bars application of New York’s pricing regulations to wireless services. Pursuant to dormant commerce clause doctrine articulated by the U.S. Supreme Court, states may not impose a burden on interstate commerce that “is clearly excessive in relation to the putative local benefits.”³⁰ Applying the proposed or existing price gouging regulations to wireless services fails that test. First, wireless communications are unquestionably interstate in nature – wireless services can and are used to communicate throughout the United States without regard to state boundaries. In other words, New York regulation would inevitably produce regulatory effects beyond state lines. Second, as discussed above, pricing regulation *has no benefits* for New York consumers, as wireless prices are low and declining due to rampant competition and investment, and there is no evidence to suggest that they fluctuate greatly in response to temporary market disruptions. Finally, applying the proposed regulations to wireless would impose real costs in terms of monitoring compliance, and *any* costs here are clearly excessive in comparison with *zero* benefits. Accordingly, the regulation would be barred.

IV. CONCLUSION.

The wireless marketplace spurs the low prices that New Yorkers want, without the need for the application of anti-price gouging regulation. Introducing unnecessary compliance burdens in this highly competitive market would only create needless risk for the investment that drives lower prices and faster service across the state. And regulating wireless prices not only is unnecessary and undesirable, it is unlawful pursuant to federal law. Accordingly, CTIA urges the Attorney General to refrain from imposing unnecessary price gouging regulations on the

³⁰ *S. Dakota v. Wayfair*, 585 U.S. 162, 173 (2018) (citation and quotation marks omitted).

wireless industry. CTIA would welcome discussions with the Attorney General or her staff on the proposed regulations and would be pleased to offer appropriate limiting language to exclude the wireless industry if helpful.

Respectfully submitted,

/s/ Gerard Keegan

Gerard Keegan
Vice President, State Legislative Affairs

Michael Blank
Director, State Legislative Affairs

CTIA
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 736-3220

April 14, 2025

Webley, Alec

From: adamestravelr <adamestravelr@gmail.com>
Sent: Thursday, April 10, 2025 2:11
To: stopillegalprofiteering
Subject: Stop making rules to treated our way of life to support our families, please stop 🗣️

[EXTERNAL]

Sent from my T-Mobile 4G LTE Device

Webley, Alec

From: Edward Sosa <sosaedward44@gmail.com>
Sent: Wednesday, April 9, 2025 13:47
To: stopillegalprofiteering
Subject: Proposed AG rules could threaten your earnings

[EXTERNAL]

Good Afternoon

Edward Sosa conductor de Uber

Ya nosotros los taxista no aguantamos mas regulaciones, ni mas disminucion en nuestras tarifa. Favor de tener un poco de consideracion.

Saludos

Gracias

Good Afternoon

Edward Sosa, Uber driver

We taxi drivers can't stand any more regulations or any more rate cuts. Please be considerate.

Regards

Thank you

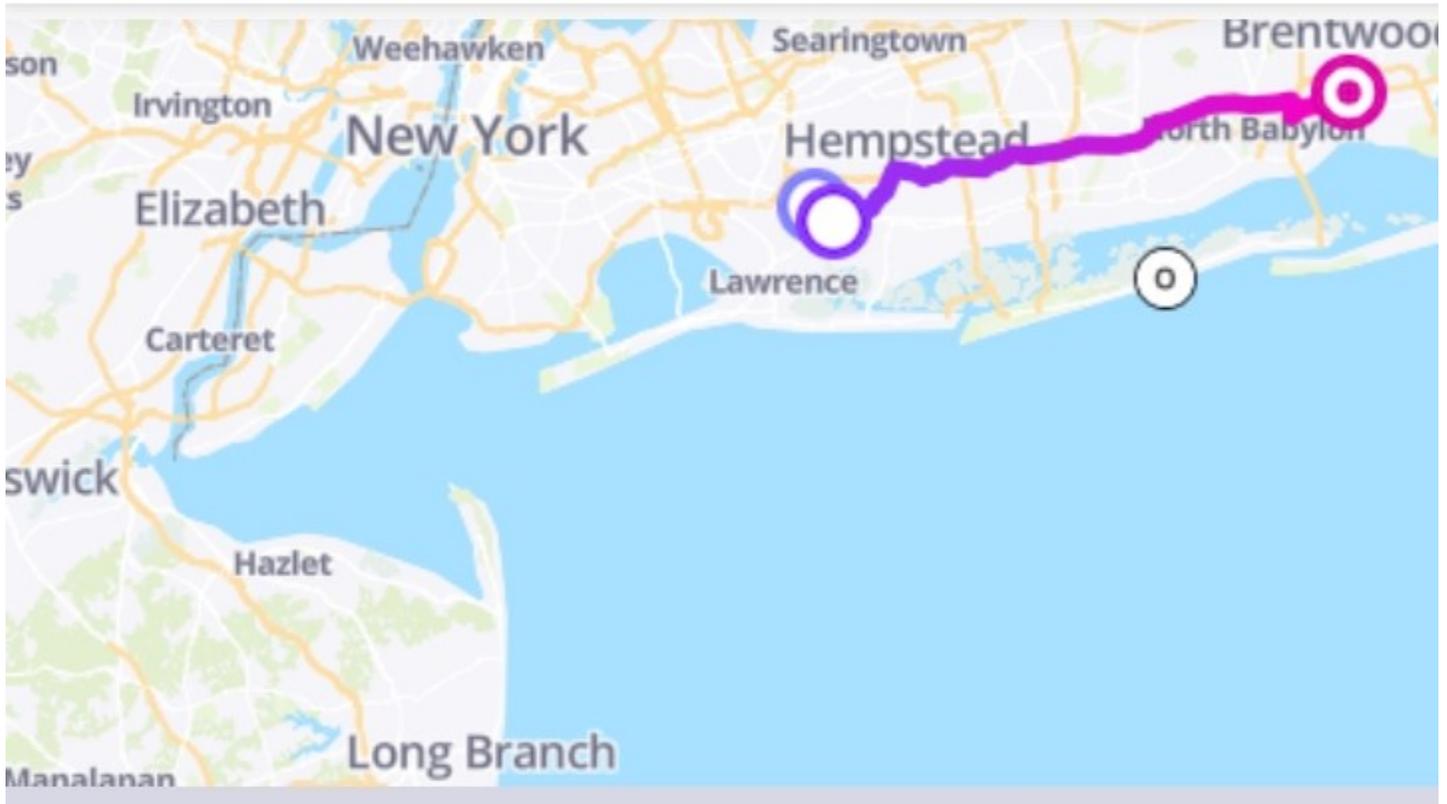
Webley, Alec

From: Faisal Javed <faisaljaved908@gmail.com>
Sent: Wednesday, April 9, 2025 14:14
To: stopillegalprofiteering
Subject: They paying very less money for long island drivers every ride

[EXTERNAL]

2:09 📶 46° 🖼️ •

← **Apr 8, 10:20 AM**



Ride route



Ride accepted

Webley, Alec

From: felixstylepizza@gmail.com
Sent: Wednesday, April 9, 2025 16:59
To: stopillegalprofiteering
Subject: Dear team of the New York Attorney General's Office, Price speculation (price gouging),

[EXTERNAL]

Dear team of the New York Attorney General's Office,

My name is Félix García, I am an Uber & Lyft driver and taxi driver registered under the Taxis and Limousines Commission (TLC) of New York City. I am writing to express my full support for the proposed rules to strengthen the law against price speculation (price increase), especially in emergency situations.

As a driver in this city, I have seen many times how Uber raises rates drastically during storms, blackouts or other events, but that does not always translate into a better profit for us drivers. In critical moments, it seems that digital platforms benefit from the crisis, while we take more risks and earn the same or even less.

I am very grateful that these new rules establish a clear limit of the 10% increase and a reference point to analyze if there was abuse. It also seems fair to me that companies with greater power in the market, such as Uber, have additional restrictions to prevent their profit

margins from increasing at the expense of workers and the public.

During the pandemic, for example, we were required to have masks, dividers, and disinfectants, but many times we had to cover those expenses out of our pocket, without real compensation. Rules like these can help so that the same thing doesn't happen again.

I thank you for considering our voices and for working to protect both consumers and those of us who work on the street every day.

Sincerely,

Felix Garcia

Uber driver and Lyft taxi under the TLC

New York City

Enviado desde mi iPhone

Webley, Alec

From: hyeongseok Seo <hyeongseokseo85@gmail.com>
Sent: Wednesday, April 9, 2025 15:57
To: stopillegalprofiteering
Subject: I oppose it

[EXTERNAL]

From: [Jesse Fehr](#)
To: [stopillegalprofiteering](#)
Subject: Price Gouging
Date: Tuesday, March 11, 2025 16:42:16

[EXTERNAL]

The Attorney General office should work with our state finance department to find that corporations are recording record profits and that looking at prices on the shelves is not enough to determine if price gouging is occurring.

In addition to the items listed in the PDF provided, the cost of internet, housing and healthcare are significantly overpriced. Healthcare companies, insurance companies and internet provider CEOs are purchasing homes within Manhattan with 30 million dollars in cash. I can provide evidence of this. No individual should be allowed to make such a ludicrous purchase when people cannot afford to live.

In addition to these need items, the cost of veterinary care in the city is up more than 100% since 2019. I can verify that the cost of a routine dental cleaning at Worth Street Vet as of 2017 was around \$800 but as of 2022 I was quoted over \$3,000 for the same service with nothing else changed.

These sort of price increases should result in jail time and not simply asking the abusers to pay a small portion of their lucrative profits back to the state. People are dying because of these abuses and it's up to the AG to give laws teeth and protect civilians.

Thanks,



Jesse Fehr

Webley, Alec

From: J M <wolfragefire@gmail.com>
Sent: Saturday, April 12, 2025 20:26
To: stopillegalprofiteering
Subject: Gas Price Gouging

[EXTERNAL]

To Attorney General James:

It is encouraging that you have taken serious actions against price gouging here in NY, including the proposed rules.

My comments are as follows:

Anti-price gouging enforcement **MUST** be aimed at three seriously overpriced goods/services here in NY:

- 1) The inflated price of gas
- 2) The shrinkflation pricing of food
- 3) The predatory pricing of rent across the state, not just in NYC

On the subject of gas prices, gas supply is at an all-time high and crude prices at a major low, however retail prices of gasoline have remained stubbornly high despite all of this, and oil companies and retail outlets are raking in the profits at the expense of everyday New Yorkers.

On the subject of food, not only have food prices increased steadily despite stabilized supply (eggs and imported products notwithstanding), they have also come with smaller portions, also known as shrinkflation.

On the subject of rent pricing, rent has increased to extreme levels not following any increase in the population levels of New York State. In fact, many people are leaving New York for lower taxes and housing prices in other states.

All of these issues must be addressed by robust anti-gouging rules and their enforcement.

Sincerely,

Joshua Mitchell
New Lebanon, NY

Webley, Alec

From: Kevin Renczkowski <krenczkowski@gmail.com>
Sent: Wednesday, April 9, 2025 17:44
To: stopillegalprofiteering

[EXTERNAL]

Don't

Webley, Alec

From: Mosheur Rahman <mrahman2275@gmail.com>
Sent: Wednesday, April 9, 2025 14:33
To: stopillegalprofiteering

[EXTERNAL]

NYC taxi drivers work hard and we deserve better. Thanks again.

Webley, Alec

From: Robert Gomez <robbgomm@hotmail.com>
Sent: Wednesday, April 9, 2025 14:30
To: stopillegalprofiteering
Subject: Please stop hurting TLC RideShare Drivers

[EXTERNAL]

Sent from my Verizon, Samsung Galaxy smartphone
Get [Outlook for Android](#)

Webley, Alec

From: bbglensfalls <bbglensfalls@aol.com>
Sent: Wednesday, April 9, 2025 13:34
To: stopillegalprofiteering
Subject: Surge pricing in NYS for Ride Share Drivers and Riders

[EXTERNAL]

To Whom This May Concern:

I have been driving Uber almost 5 years, with almost 20,000 trips. I feel I have some insight on driving pay and competition amongst drivers.

There are two problems that need to be addressed:

1. Uber's fees and how they determine them and what they pay the drivers afterwards. Uber keeps yelling us drivers their expenses go up, mostly because of Commercial Insurance rates. My personal insurance keeps going up and I hardly drive any miles personally because I drive so much for Uber. There is some merit to their argument, however, Uber now has a pricing scheme that it sends to the driver as a take it or leave it pay. I know riders tell me what Uber charges them and I know what I receive and I'm lucky if I get 30% of the fare! Mind you, we drivers use our personal vehicles with every every ride and have our own expenses. This brings me to point 2.

2. Because Uber has gotten greedy with the payout to its drivers, it has forced drivers to be more competitive with each other, which results with riders being stranded because drivers won't take the trip if it doesn't pay enough. A lot of drivers cause the surge pricing by not taking those trips or shutting off their apps to drive up demand. Uber could care less that some drivers are doing that because Uber collects more money too.

In conclusion, Uber has driven up their rates to riders, cut the pay of drivers, situated the market with too many drivers, and some drivers are either not taking trips or purposely shutting off their apps to increase demand. Uber's business model should be service. Instead it's increasing bottom line, which is making drivers too competitive because of Uber's take rate.

My opinion: Uber needs to put a cap on the amount of drivers in the market, increase the payout rate to the drivers so all trips are worth it and Uber needs to enforce its acceptance rates and cancellation rates so all drivers can provide service to all riders.

Thank you.

William E. Bombard
518 321 1632
P.O. Box 882
Glens Falls, NY 12801

Sent from my Galaxy

Webley, Alec

From: Zico Kashef <zicokashef@gmail.com>
Sent: Wednesday, April 9, 2025 14:57
To: stopillegalprofiteering

[EXTERNAL]

I believe everything before is great
I don't accept the new rules

Written Testimony of Andrew Greenblatt
Policy Director
Independent Drivers Guild (IDG)
Related to Proposed Rules Concerning
Section 396-r of the GBL (Price Gouging)
Office of the New York State Attorney General
April 11, 2025

My name is Andrew Greenblatt, and I am the Policy Director of the Independent Drivers Guild (IDG). Thank you for this opportunity to submit this testimony concerning the proposed Price Gouging rules.

The IDG is a nonprofit affiliate of the International Association of Machinists and Aerospace Workers (IAMAW), and our organization represents over 100,000 for-hire vehicle drivers in New York State.

I am submitting this written testimony regarding the proposed rules for rideshare companies and drivers in New York State.

When regulations were first proposed in 2023, we testified that we believed the law allowed ride-hailing companies to continue the practice of surge pricing when needed to attract additional labor (drivers) during disruptions. Raising pay for workers during a crisis is a common practice; for example, hospitals offered extra pay to nursing staff during the COVID-19 pandemic. We urged the Attorney General to clarify that surge pricing would continue to be allowed as long as the money was being spent on driver pay and not increased profits for the ride-hailing companies. See our testimony from 2023, attached.

We were happy to see that the current proposed rules clearly state that labor is a “necessary” cost and that increases in price to pay for labor costs are allowed. For example, proposed regulation 600.8(b)(5) states, “A cost is ‘necessary’ to the provision of an essential product if (i) it is a labor cost...”

We were also pleased to see that the proposed regulations cap ride-hailing profits rather than costs, including labor costs.

In case there was any doubt about the Attorney General’s intentions, the accompanying report, “Price Gouging Economics and Price Volatility,” uses surge pricing as an example of allowed activity, as long as the increase in cost to the passenger is passed along to the drivers providing the labor rather than going to ride-hailing company shareholders as increased profits.

“The ride-hailing service that raises driver pay for a given ride by \$X and then raises the price of that ride by \$X has not engaged in price gouging even if \$X is a substantial sum. It is only if the increase of price increased the ridehailing company’s profit margins for that ride that the ride-hailing company has violated

the price gouging statute.” (“Price Gouging Economics and Price Volatility,” OAG Staff Report, February 2023, 19.)

We thank the Attorney General and her staff for listening to our concerns in 2023. With these essential clarifications, the IDG does not oppose these regulations.

To discuss this further, please contact:

Andrew Greenblatt, Policy Director
(646) 847-9606
andrew@idgbenefits.org

Written Testimony of Andrew Greenblatt
Policy Director
Independent Drivers Guild (IDG)
Related to Proposed Rules Concerning
Section 396-r of the GBL (Price Gouging)
Office of the New York State Attorney General
May 19, 2023

My name is Andrew Greenblatt, and I am the Policy Director of the Independent Drivers Guild (IDG). Thank you for this opportunity to submit this testimony concerning the proposed Price Gouging rules.

The IDG is a nonprofit affiliate of the International Association of Machinists and Aerospace Workers (IAMAW), and our organization represents over 100,000 for-hire vehicle drivers in New York State.

I am submitting this written testimony regarding the proposed rules for rideshare companies in New York State. This testimony follows a discussion with the Office of the Attorney General staff via video conference on May 3, 2023.

While we appreciate the state's effort to regulate dynamic pricing during market disruptions and prevent price gouging, we have concerns that the proposed changes may inadvertently harm both workers and passengers unless the rules are clarified further. The proposed rules allow rideshare firms to increase costs for rides during market disruptions, as long as the additional fees are spent on justified increased costs, including labor costs. Our fear of a misunderstanding of the proposed rules concerns the section forbidding firms from passing along increases "within their control." Given the control firms in general, and rideshare in particular, have over labor costs, we are worried that rideshare firms might avoid paying their workers more during market disruptions, starving workers of much-needed pay and leaving passengers unserved during urgent and/or dangerous situations.

The proposed rules allow firms to raise prices to cover increased labor costs. Specifically, the proposed rule section 500.7 addresses dynamic pricing and states that a firm that would be liable for price gouging due to this provision may defend against a price gouging claim by proving that the aggregate profit divided by the aggregate units sold is the same as the aggregate profit divided by the aggregate units sold a week prior during the same time period. Additionally, proposed rules in section 500.2 state that costs not within the control of the defendant, including "labor," may be passed along to consumers as increased prices.

Taken together, these changes mean that rideshare companies will be allowed to raise prices during market disruptions - and pay labor whatever increased rates are needed - as long as it doesn't lead to increased profits for the rideshare firms.

Confusion may arise from proposals in section 500.2 that would prohibit passing along costs unless they are "not within the control of the defendant." Since rideshare firms set the increased

labor rate during price surges, this could be read to forbid firms from passing the increased rates for labor along to passengers during a market disruption.

We believe this is the wrong reading of the rules and recommend that the rules be enacted with clarification to prevent this misreading. The examples of costs that are within the firm's control, and, therefore, forbidden, are cases in which higher costs today are just attempts to capture increased profits later when the disruption is over. For example, front-loading debt repayment today will lead to higher profits tomorrow. Passing increased fees on to laborers will not increase profits for the firms today or in the future.

Furthermore, increased labor costs are typically “within the control” of all firms to some extent. Firms choose to offer hazard pay or raise pay rates during market disruptions in order to entice workers to fill otherwise vacant positions during urgent and/or dangerous situations. For example, hospitals raised pay for nurses during the recent pandemic to fill open positions needed to meet the increased need and dangers. Similarly, rideshare firms often need to raise drivers' rates to fill unmet transportation needs during a market disruption.

Therefore, we urge the New York State Attorney General's office to clarify the rules regarding rideshare companies and their ability to raise prices during market disruptions as long as the additional income is passed along to drivers. It is important to ensure that workers and passengers are not inadvertently harmed by these rules and that rideshare companies can continue to provide vital services during times of disruption.

Industry Information

During our discussion on **May 3, 2023**, OAG staff requested that we submit information concerning how surge pricing operates in our industry from a driver perspective. We do not have statistical data on the subject, but as a driver-led organization that has been working with thousands of drivers over the years, we can share the following:

1. Drivers respond to surge pricing - Surge pricing can occur whenever the demand for drivers outstrips the supply in the area. In order to attract more drivers to cover an area, rideshare firms raise the per-minute and per-mile pay for trips that are in high demand and otherwise wouldn't be met. This may bring drivers from an overserved geographic region to an underserved area, or it may encourage drivers to start driving or extend their shifts. This pay is analogous to other forms of incentive pay firms choose to use to attract labor when the demand isn't being met, such as hiring bonuses or hazard pay. Like those forms of increased costs of labor, surge pay should be considered an increased cost of labor that is necessary to meet the needs, most importantly during an emergency or other market disruption. For example, during the height of the pandemic, drivers were enticed to risk their health and lives to transport healthcare workers by offering the drivers increased pay.
2. Drivers rely on this pay - New York State rideshare drivers are disproportionately immigrants working for low wages. In New York City, where approximately 85% of rideshare rides occur in New York State, 91% of the drivers were born in another country. The city now (thanks to a complaint filed by the IDG) requires rideshare firms to

pay a minimum compensation rate that covers expenses and brings take-home pay up to the minimum wage. Surge pricing pays above this floor, and savvy drivers know when surges will likely occur. These drivers plan their workday around when they are more likely to get work, especially surge pricing.

Given the importance of surge pricing both to drivers and the passengers who rely on them to work, we urge the Attorney General to make sure that any new rules clearly allow firms to continue offering surge pricing during market disruptions and during business as usual.

If you have any questions, please feel free to contact Andrew Greenblatt at andrew@idgbenefits.org or 646-847-9606.



185 Berry Street
Suite 400
San Francisco, CA 94107

Comments of Lyft, Inc. on Proposed Price Gouging Rules, I.D. Nos. Law-06-25-0005-P — Law-06-25-00012-P¹

Lyft, Inc. (“Lyft”) submits these comments on the proposed price gouging rules (“Proposed Rules”) announced by New York Attorney General’s office (“NYAG”) in the February 12, 2025, NYS Register.² For ease of reference and context, Lyft submits this single set of comments on all eight of the Proposal Rules³ and requests that they be added to each regulatory docket.

Lyft appreciates the opportunity to comment on the Proposed Rules. Lyft also appreciates the NYAG’s consideration of comments on prior proposals and its efforts to better define the applicability of the price gouging statute, N.Y. Gen. Bus. Law § 396-r (“Section 396-r”), to rideshare services and dynamic pricing. Despite the NYAG’s efforts, however, the Proposed Rules would materially limit a rideshare company’s ability to take steps to match drivers with riders in New York. The Proposed Rules would also penalize activities that are not price gouging and that fall clearly outside of the statute’s intended reach. They also raise significant due process concerns because they fail to reasonably identify the prohibited conduct or provide the regulated community with a means for compliance. If finalized as proposed, the rules would be arbitrary, capricious and contrary to law.

Lyft’s comments focus primarily on Proposed Rule 600.5, with additional feedback on Rules 600.4, 600.6 and 600.9.⁴ Because both consumers and companies benefit from rules that are administrable, clear, and lead to predictable results, Lyft suggests revisions to the Proposed Rules that would better promote regulatory clarity, ensure due process, and more closely align the rules with the operational realities of dynamic pricing markets.

I. The Lyft Platform

The Lyft platform (“platform”) and the Lyft application (“app”) provide a marketplace where, among other things, persons who want rides to certain destinations (“riders”) can be matched with drivers who are driving to or through those destinations (“drivers”). This matchmaking function is a primary service that Lyft provides to users — both riders and drivers alike. The Lyft app is available statewide, 24/7. Lyft-matched rides are provided by drivers, who

¹ Submitted via email to stopillegalprofiteering@ag.ny.gov.

² 6 NY Reg. 2-15 at 2-15 (Feb. 12, 2025).

³ February 2025 Notices of Proposed Rule Making related to the relevant Proposed Rules are available at <https://ag.ny.gov/rulemaking-laws-price-gouging>.

⁴ By limiting its comments to these Proposed Rules, Lyft does not intend to waive its rights in any future proceeding or rulemaking to challenge the other proposed rules, the final rules once enacted, or the underlying statute.

are independent contractors who choose whether and when to log into the app and accept rides. The Lyft platform utilizes products, incentives, and technology features designed to help facilitate rider and driver connections, maximize efficiency, and meet the demand for rides in a given area. Lyft's pricing is dynamic, meaning that it regularly changes based on market dynamics, and it takes into consideration multiple factors that vary by location, time of day, ride request type, the volume and location of ride requests and the volume and location of available drivers, as well as traffic and other travel conditions at the particular time that a ride is requested.

During certain periods when rider demand exceeds the number of drivers available to meet the needs of riders in a given area, Lyft utilizes Prime Time pricing and driver incentives in an effort to balance the Lyft marketplace and encourage more drivers to accept requested rides.⁵ Prime Time pricing and driver incentive strategies can be tailored to specific zones within a city, as demand and driver availability can fluctuate even within small geographic areas. By adjusting Prime Time and incentives at this granular level, Lyft can more effectively address localized imbalances and respond dynamically to real-time conditions. As a regular business practice, in response to certain extreme events and emergencies, Lyft takes steps, including but not limited to manually adjusting or turning off Prime Time pricing. Lyft is concerned that the Proposed Rules would both hinder the rider experience and limit Lyft's ability to create more earnings opportunities for drivers by incentivising them to high demand areas.

In addition, Lyft's earnings commitment guarantees that a driver's weekly earnings will be at least 70% of rider payments after external fees. If a driver's earnings are below 70% when each week ends, they will get paid an earnings adjustment to make up the difference.

II. Dynamic Pricing Calls for Unique Analysis

The New York price gouging law prohibits selling goods or services at an "unconscionably excessive price" during an abnormal market disruption. § 396-r(2). While Section 396-r does not define this term, it allows the NYAG to establish a prima facie case through evidence of a "gross disparity" between prices before and during the disruption, and allows a defendant to rebut a prima facie case with evidence that: (1) the increased price preserves the pre-disruption profit margin; or (2) certain additional costs were imposed on the defendant. Proposed Rule 600.5 is geared toward clarifying how the NYAG would determine a prima facie case in the context of dynamic pricing. Section 600.5(c) specifically focuses on dynamic pricing for "for-hire transportation services," including rides facilitated by rideshare companies.

Creating a separate standard for "for-hire ground transportation services," including ridesharing, could be reasonable because of how distinctive the dynamic pricing model is for this market.⁶ Lyft's Prime Time pricing, for example, is a critical tool for maintaining real-time balance between rider demand and driver supply. It adjusts rider fares based on current market

⁵ Further information regarding pricing can be found in Lyft's Terms of Service and on the Lyft Help Center (*see* <https://www.lyft.com/terms> and <https://help.lyft.com/hc/en-us/all/articles/115013080308-How-to-estimate-a-Lyft-ride-s-cost>).

⁶ Proposed Rule 600.5 at 25-26 (concluding that the dynamic pricing methods used by "for-hire ground transportation services" are "sufficiently distinctive as to merit separate treatment").

conditions and helps ensure the efficiency of the rideshare network. When rider demand exceeds driver availability, Lyft utilizes Prime Time pricing and driver incentives in an effort to help prevent unfulfilled ride requests. By utilizing Prime Time pricing and driver incentives during periods of high demand, more drivers are incentivized to accept ride requests through the Lyft app. Such dynamic adjustments enable more efficient rider-driver matching. They support a smoother, more reliable experience for both sides of the marketplace, and promote service quality and consumer choice. Without the system described above, the Lyft marketplace would be more prone to extreme imbalances of supply and demand, *e.g.*, large numbers of riders seeking rides and a lack of drivers accepting those ride requests, or potentially large numbers of drivers offering rides at times when few riders are making ride requests.

As the proposal acknowledges, in the context of dynamically priced services, like rideshare, it would be “problematic to uncritically compare the price ‘at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market’ to prices charged post-disruption because there may be hundreds of different pre-disruption prices charged within a reasonable interpretation of the time period ‘immediately prior to the onset of the disruption.’” Proposed Rule 600.5 at 18. But Lyft has concerns that, as currently structured, the proposed rules are unworkable and would lead to arbitrary results that will neither serve as evidence of price gouging or protect the public. We provide comments and suggestions regarding how the proposed rules could better achieve their goals and facilitate administrable means for rideshare companies to continue using dynamic pricing in a manner that complies with Section 396-r.

III. Proposed Section 600.5 Should Be Refined to Ensure Fair and Effective Application to Dynamic Pricing

Rideshare prices can substantially vary for a variety of reasons. Consider the many kinds of rides that take place every day in Manhattan. For example, the duration of a ride from Penn Station to a given destination on one day can vary substantially from the duration of the same ride a week before, due to traffic, a car accident, a road closure or any number of additional factors that occur in the ordinary course. The two rides are by no means the same or comparable and a rider would understand why one ride took twice as long and also cost more – including on a per mile basis – even though the two rides were the same distance between the same locations. Or consider the example of a ride home after a New York Knicks game, a high-demand situation in which a rideshare company may utilize dynamic pricing and driver incentives to encourage drivers to fulfill requests in a busy area and also generate more opportunities for drivers. A rider would likely expect that such a ride would be more expensive on a per mile basis than the typical median price of rides within 20-mile radii of any point on their route home.

But unfortunately, as explained below, without further clarity and adjustments to the Proposed Rules, a rideshare company could be penalized simply because, as a result of unpredictable traffic well outside of the company’s control and unrelated to a disruptive event, a single ride took longer than usual and, as a result, was more expensive on a per mile basis than the pre-disruption median price for all rides. Similarly, if that Knicks game happened to take place during a disruption (for example, during a severe snowstorm) and the per mile cost was greater than the median price per mile for all rides within a 20-mile radius during the pre-disruption period, the rideshare company could be at risk for alleged price gouging.⁴ To

avoid the risk of inapt findings of price gouging presented by scenarios like these, a rideshare company may decide to limit or even avoid utilizing tools like dynamic pricing and driver incentives in certain situations, making it more difficult for riders to find rides home – a bad result for riders and drivers alike.

Similar issues may arise in connection with numerous other types of relevant rides. To ensure the rules are predictable, fair, afford due process, and properly implement Section 396-r, Lyft suggests the NYAG consider several modifications to Proposed Rule 600.5 or withdrawing the proposal.

A. Proposed Section 600.5(c) should be revised or reconsidered to better reflect the realities of dynamic pricing in ridesharing

Proposed Rule Section 600.5(c) would set the prima facie standard for price gouging for “for-hire transportation services,” including rides facilitated by rideshare companies. Generally speaking, it would assess whether there is a “gross disparity” by comparing the price per mile of any individual “scrutinized” ride during a disruption to the median price per mile charged during a pre-disruption benchmark for all rides within 20 miles of any point of the route of that ride. Proposed Rule § 600.5(c)(1)(i).⁷ In the alternative, if the Attorney General or the seller can prove by a preponderance of the evidence that the price of some or all of the rides used in the pre-disruption median were “abnormally high or abnormally low owing to one or more seasonal events,” and other rides within 30 days before the benchmark date provide a better benchmark for the scrutinized ride, the benchmark median would seemingly be calculated based on those “other rides.” Proposed Rule § 600.5(c)(1)(ii). Unfortunately, however, neither option creates apples-to-apples, or even relevant, comparators for reasons including the following:

1. *Median-to-Specific Price Comparison is Arbitrary.* Under the current proposal, *the median price of all rides* during the pre-disruption period would be compared to *the price of any one specific ride* during the disruption. Comparing a median price from the pre-disruption period to the price of any single ride during the disruption would create arbitrary and unmeaningful results. By definition, a median price separates the higher half of prices from the lower half. Thus, even if one were to analyze all rides on exactly the same day and time as the pre-disruption benchmark, more than half of those rides would be more expensive than the median. There are a number of reasons for this. For example, the price per mile can change substantially due to traffic congestion, which can substantially impact the duration of the ride. And, of course, during the morning rush hour, one would expect a ride into Manhattan to experience more traffic – and therefore, longer durations and prices – than rides leaving Manhattan along the same route on the same day and time.⁸ Proposed Rule 600.5, however, would not account for such variations that occur in the usual course of business.

⁷ Under the proposal, the “benchmark date” would be, presumptively, the date of the triggering event or “the first date, within thirty days prior to the date of the triggering event, on which the seller increased the price . . . in a departure from the seller’s usual course of business practices.” Proposed Rule § 600.5(a)(1).

⁸ Nor does the proposed per mile calculation – which is based simply upon “the total amount charged to the buyer” in any way account for variations in price that are based upon whether bridge tolls, congestion pricing or any number of other third-party fees, tolls, surcharges and/or taxes apply to a particular ride. Lyft suggests that the NYAG revise Proposed Rule 600.5 to address this..

Similarly, if the prices of all rides across a rideshare platform during a disruption were to remain exactly the same as they were in the pre-disruption benchmark, roughly half of all ride prices would once again be more expensive than the median. In other words, even if there were absolutely no “disparity” between the prices of any rides before and during the disruption, under Proposed Rule 600.5, there would nevertheless exist “prima facie proof” of an alleged price gouging violation for up to half of the rides on a rideshare platform, based upon an alleged “gross disparity” between the prices before and during the disruption.⁹ Thus, the rule would result in arbitrary findings of presumptive price gouging that are incorrect and inconsistent with the plain language of Section 396-r.

To avoid these arbitrary results, one option would be to revise Proposed Rule § 600.5(c) to compare the *median (or average) price* of all rides during the disruption to *median (or average) price* of all rides during an appropriate benchmark.¹⁰

2. *Moving Region of 20-Mile Radius From Any Point on Route is Overbroad and Unworkable.* The proposed rule refers to the median price(s) “within any part of New York State 20 miles of any point of the route of the scrutinized ride” during a pre-disruption time frame. Proposed Rule § 600.5(c)(i). This would result in virtually infinite geographic areas of varying shapes and sizes that would have varying per mile median prices during the pre-disruption benchmark. It is not clear how this would provide “an easily administrable enforcement mechanism” (Proposed Rule 600.5 at 31), nor how a company could, at the outset of a disruptive event, determine pre-disruption median prices for such a large number of varying regions and take steps to ensure ongoing compliance based upon those varying median prices. Fundamental due process protections require that laws and regulations “be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply them.” *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012). By failing to provide a reasonable means for sellers to ensure compliance in advance of an alleged violation, Proposed Rule 600.5 misses the mark.

In addition, it simply isn’t the case that all rides within such large areas – which start with a 20-mile radius at the origin of the trip and then expand to encompass the 20-mile radii of every

⁹ Lyft acknowledges that the NYAG has proposed to make a 10% increase the threshold for establishing a prima facie “gross disparity.” See Proposed Rule 600.6. However, a 10% difference from the median can be well within the norm of price variation. In addition, under Proposed Rule 600.4, certain companies would be subject to a presumption of unfair leverage based upon *any* price increase during a disruption.

Lyft also notes that this option would assess the median prices *during the disruption*, whereas the Proposed Rule refers to the price “within one hour of the time of day at which the scrutinized ride took place.” As noted and as the Proposed Rule acknowledges, prices of dynamically priced goods and services can vary from hour to hour and, of course, certain disruptions could last for days on even longer. Thus, compliance with the current Proposed Rule would require a company to assess *numerous* median pre-disruption hourly prices and take separate steps on an hour-by-hour basis throughout the disruption. That is potentially unworkable and may disrupt a rideshare company’s ability to continue the expected level of service during a disruption.

¹⁰ As noted below, the rule also should reflect that, for purposes of rebutting a prima facie case under Section 396-r(c), a rideshare company can present evidence that: (1) the increase in the amount charged for all of the relevant rides during the disruption preserves the median (or average) margin of profit that the defendant received for the same goods or services prior to the abnormal disruption of the market; or (2) additional costs not within the control of the defendant were imposed on the defendant for the all of the relevant rides price during the disruption.

point along the route of a ride – constitute comparable services under Section 396-r. *See* Section 396-r(3)(b)(i) (referring to the “value measured by the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market”). Even with respect to the initial 20-mile radius from the origin of a ride, conditions in many parts of New York are starkly different at the same time of day. Rush hour in Manhattan and Yonkers, for example, is not comparable. Nor is traffic the same in Queens and Uniondale, including but not limited to, when an event is letting out at Nassau Coliseum. The proposal would produce similarly inapt comparisons between downtown Buffalo and a nearby suburb at rush hour. And of course, the variations become much more apparent as the pre-disruption region for a ride morphs across every point of the scrutinized ride.

In addition, the moving 20-mile radii target conflicts with the very purpose of dynamic pricing. Consider the Knicks game example mentioned above. Dynamic pricing and driver incentives help address the imbalance between high rider demand and low driver acceptance during such high-traffic periods. But if the Knicks game coincided with a disruption, dynamic pricing would subject the rides departing Madison Square Garden to potential price gouging scrutiny because those rides would likely cost more on a per mile basis than the median pre-disruption price-per mile for all rides within a 20-mile radius. This would be the case even if the same pricing differences had existed following Knicks games prior to the disruption as there are other factors at play (*e.g.*, weather, gridlock days, etc.). Rides 20-miles away from Madison Square Garden at that time simply are not the same “such goods or service” (and, in many cases, they’re not even similar).

To avoid random and arbitrary comparisons and to support administrable compliance programs, the proposal should be revised to focus on comparable rides within comparable areas. If the NYAG determines that the rule must provide guidance on what constitutes a comparable area, one option would be to consider the boundaries that a rideshare company uses when managing its marketplace. While inapt comparisons would still remain, a rule tied to a specific and identifiable region would be much more administrable than the current proposal.

3. The Proposed Temporal Comparators Lack Context Sensitivity. Comparing the price of a ride to the median price of all rides within the same time of day within four weeks of a specific single ride does not provide relevant comparators. Although time of day and relatively close time periods are important variables, they are insufficient to ensure true apples-to-apples comparisons. *See* Section 396-r(3)(b)(i) (referring to “the value measured by the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market”).

Consider, for example, the effect of certain events and holidays—think St. Patrick’s Day, U.N. week, or Christmas—on rideshare demand (and, consequently, rideshare fares). Under the Proposed Rule, if a disruption period encompassed St. Patrick’s Day (Monday, March 17, 2025), then prices from the four preceding Mondays would be used to calculate the pre-disruption benchmark price. But March 17 was St. Patrick’s Day, a holiday that – whether before, during, or after a disruption period – can substantially impact traffic patterns, rider demand and driver availability; which call for adjustments to dynamic pricing and driver incentives (which help Lyft match riders with drivers who may not otherwise be in the same area or available to accept

rides). Accordingly, the median price on the four Mondays before the benchmark date would not serve as a reasonable proxy for the “value” of rides provided on St. Patrick’s Day, *see* Section 396-r(3)(b)(i). Similarly, major sporting events, conferences, and concerts substantially affect dynamic pricing. And other events, such as religious holidays, can substantially reduce driver availability and therefore the balance of the Lyft marketplace in certain regions. In such situations, without dynamic pricing and driver incentives, many riders could be left without drivers to get them from Point A to Point B. When a disruption period coincides with one of these other events, but the pre-disruption benchmark period does not reflect comparable events, the proposal would necessarily yield *prima facie* cases that merely reflect differences in demand and conditions that occur in the ordinary course of business (regardless of any impact resulting from the disruptive event).

Any final rule must ensure that the compared conditions are similar. If the scrutinized ride or rides occur during a holiday or when a sporting event lets out, then it should be compared to prices on similar holidays or when similar sporting events let out. Proposed Section 600.5(c)(1)(i) does not achieve this result, and instead would lead to arbitrary ride price comparisons.

B. Proposed Section 600.5(c)(1)(i) and 600.5(c)(1)(ii) Should Be Revised to Provide More Accurate and Contextual Comparators

Lyft recognizes that the proposal attempts to address some of the above concerns by allowing for certain evidence regarding the impacts of seasonal events on pricing. But the rule is limited to evidence regarding seasonal events *before the disruption*, whereas, as discussed above, it is crucial to consider whether seasonal events (other than and unrelated to the triggering event) impacted prices *during the disruption*.

Specifically, Proposed Section 600.5(c)(ii) provides that either the Attorney General or the seller can adjust the presumptive pre-disruption comparator if they can prove by a preponderance of the evidence that “(A) the price of some or all of the rides making up the median calculated pursuant to subdivision (c)(1)(i) was abnormally high or abnormally low owing to one or more seasonal events and (B) other rides taking place within 30 days before the benchmark date more closely resemble the scrutinized ride[.]” And “seasonal events” is defined to mean “events that result in the demand for ride-hailing services in the relevant location being different from the usual or expected level of demand on the day of the week and time of day in question; seasonal events include but are not limited to triggering events, public or religious holidays, annual diplomatic gatherings, and large entertainment events.”¹¹ Proposed Rule § 600.5(a)(4).

Proposed Section 600.5(c)(ii) is an acknowledgement that seasonal events unrelated to

¹¹ The definition of “seasonal events” currently focuses on events where unusual or expected levels of *ride demand* impact prices, but as discussed elsewhere, unusual or unexpected levels of *driver availability or acceptance* can similarly impact prices. Accordingly, the definition of “seasonal events” should be revised to encompass situations in which events, such as religious holidays or large-scale gatherings, have an unusual or unexpected impact on the number of drivers accepting rides.

In addition, the “seasonal events” (and likely the term, “seasonal events” itself) should encompass additional unpredictable other factors that can impact ride prices, such as road closures, car accidents, traffic and the like.

disruptive events can impact prices in a manner that calls for adjustments to the proposed price gouging analysis. But the proposed rule only allows the parties to present arguments regarding such events that occur during the pre-disruption benchmark period – not those that occur during the disruption. As a result, under Section 600.5(c)(1)(i): (1) if St. Patrick’s Day occurred before the disruption, the pre-disruption benchmark could be adjusted downward because prices that day were “unusually high;” but (2) if St. Patrick’s Day occurred during the disruption, the subsection would not permit a rideshare company to present evidence that higher prices that day were attributable to the holiday and not the disruptive event that happened to overlap with the holiday. As a result, a company could be subject to price gouging liability even if they were to ensure that prices remained the same as prices during similar seasonal events outside of the disruption period.

By limiting sellers’ ability to account for price increases driven by seasonal events that occur simultaneously with (but are unrelated to) a disruptive event, the Proposed Rule could result in findings of price gouging that are arbitrary and inconsistent with Section 396-r and would interfere with companies’ right to present relevant evidence establishing that prices were not “unconscionably excessive” under Section 396-r. *See* Section IV., below. Revising the Proposed Rule to appropriately account for the effect of seasonal events that occur during a disruption would be consistent with the statute and yield more fair and predictable rules, and an administrable enforcement program. It would also alleviate some of the concerns regarding due process and the arbitrary and capricious nature of the Proposed Rules by providing a rule that sufficiently informs the regulated community of what conduct is prohibited and therefore a better understanding of the means to avoid litigation – and potential arbitrary and incorrect findings – regarding rides that have nothing to do with price gouging.

C. The NYAG Could Also Consider a Cap-Based Approach

Lyft shares the NYAG’s desire to have clear rules that are both consistent with Section 396-r and administrable. As discussed above, the current Proposed Rules would require substantial revision in order to meet those goals.

An alternative solution may be to set an appropriate cap on the dynamic multiplier when Section 396-r has been triggered for rideshare services. Lyft notes that the NYAG rejected another commenter’s request to set a 3.0X base fare multiplier as a price increase cap for dynamically priced rideshare rides during a state of emergency declared by the Governor. Proposed Rule 600.5 at 29. One of the NYAG’s primary concerns was that a 3.0X increase would not prevent “gross disparities,” particularly given that Proposed Rule 600.6 would presume that “a 10% disparity in price is a “gross” disparity as an empirical matter,” under Section 396-r(3)(b)(i). *Id.* But using a dynamic multiplier of a certain percentage is not the same as charging “a price that is [that percentage] greater than [] that essential product’s pre-disruption price.” Proposed Rule 600.6. at 4. Take, for example, a 50% multiplier designed to incentivise more drivers to pick up riders near an event, like a Knicks game, prior to a disruptive event. In that scenario, a ride that might otherwise cost \$10 would cost \$15. If that same multiplier were used during a disruptive event, the multiplier would in no way increase prices beyond the pre-disruption price and would not support a presumption of a “gross disparity” of prices before and during the disruptive event. *See* Section 396-r(3)(b)(i).

In addition, as the preamble recognizes, prices for similar rides during a given period

substantially vary, with some high prices being well over the median. Proposed Rule 600.5. at 29 n.97. These higher prices, unrelated to triggering events, show the variability of the dynamic pricing market. The use of a dynamic multiplier that is consistent with pricing practices in “the usual course of business” is not “grossly excessive,” nor does it yield a “gross disparity.” *See* Section 396-r(b)(i). Plus, as the NYAG has noted, prices can lawfully increase during a disruptive event if, among other things, “the increase ... preserves the margin of profit that the seller received ... prior to the abnormal disruption” *See* Proposed Rule § 600.4(d)(1). Accordingly, Lyft believes that it would be possible to develop a cap (well above 10%) that would provide clarity for NYAG and the regulated community, reflect the normal variation in dynamic pricing, and protect the public from grossly excessive prices.¹²

For these reasons, Lyft believes that setting a reasonable cap could be far more administrable and fair than the current proposal and Lyft would be happy to further discuss an appropriate cap based approach.

IV. The Proposed Rules Should Be Revised to Eliminate Any Extra-statutory Limits on Affirmative Defenses

Throughout the price gouging statute, the Legislature clarified its intention that the statute apply to truly extraordinary events and “unconscionably excessive” pricing. Section 396-r. It specifically notes that “[w]hether a price is unconscionably excessive is a question of law for the courts.” Section 396-r(3). And it instructs the courts to evaluate whether prices are “unconscionably extreme,” an “exercise of unfair leverage or unconscionable means,” or a combination of both, Section 396-r(3)(a), by applying clear statutory factors, Section 396-r(3)(b). As part of this court-determined analysis, a defendant is entitled to present any evidence that would show “(1) the increase in the amount charged preserves the margin of profit that the defendant received for the same goods or services prior to the abnormal disruption of the market, or (2) additional costs not within the control of the defendant were imposed on the defendant for the goods or services.” Section 396-r(3)(c). Indeed, as noted above, the NYAG has acknowledged that the statute applies only to truly “unfair” pricing during a market disruption and ensures that sellers may maintain their right to profit even during a disruption. *See* Proposed Rule 600.4 at 16.

Unfortunately, however, the Proposed Rules might be read to limit the affirmative defenses enshrined in the statute. As the NYAG is well aware, an agency may not create “its own comprehensive set of rules without benefit of legislative guidance;” rather, its rules must at least be consistent with the statute enacted by the Legislature. *NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 182 (2016); *see also Boreali v. Axelrod*, 71 N.Y.2d 1, 11, (1987) (noting that policymaking is the legislative branch’s

¹² The NYAG also noted concerns that the other commenter’s proposal lacked a clear definition of “base fare” to which the multiplier would be applied, and that “[a] declaration of a state of emergency by the Governor . . . is not a precondition to the onset of an abnormal disruption of a market under the statute.” Lyft does not believe these are insurmountable hurdles to a cap-based price gouging rule. Proposed Rule 600.5 at 29. Other jurisdictions have been able to develop cap-based approaches. *See, e.g.*, 66 Pa.C.S.A. § 2607(e); CT Gen Stat § 13b-118(b)(4)(C); and R.I. Gen L. § 39-14.2-3(b). And, while Lyft encourages the NYAG to ensure that the business community has notice regarding when disruptions begin and end of disruptive events in an effort to facilitate compliance, that request is not unique to a cap-based approach. Lyft would be happy to engage in further discussion about how to develop an appropriate cap.

responsibility). The legislature clearly established a policy of allowing defendants to present evidence that they were merely preserving their profit margin or reacting to costs outside of their control. The Proposed Rules may not limit these broad affirmative defenses authorized by Section 396-r. Nor may they limit a defendant’s right to present evidence supporting other applicable defenses. Indeed, even where a plaintiff establishes a prima facie violation of a regulation, a defendant may present additional evidence supporting affirmative defenses and rebutting causation. *See, e.g., Masmalaj v. New York City Econ. Dev. Corp.*, 197 A.D.3d 1292, 1293 (2021). To the extent that any of the Proposed Rules’ affirmative defenses or rebuttals are inconsistent with Section 396-r(3)(c)’s clear preservation of a defendant’s right to present evidence that a price increase preserves profit margins, resulted from costs outside of the defendant’s control, or any other applicable defense, they exceed the NYAG’s authority and must be revised.

a. Proposed Rule 600.5 Should Clarify Evidence that Would Rebut a Prima Facie Violation

A prior version of the Proposed Rules recognized the relevance of affirmative defenses to this rulemaking. For example, the Previously Proposed Rule 500.7 included the following affirmative defense to rebut a claim of price gouging in the context of dynamically priced goods and services: “[a] seller . . . may affirmatively defend against a price gouging claim by proving that the aggregate profit divided by the aggregate units sold is the same as the aggregate profit divided by the aggregate units sold a week prior during the same time period.”¹³ While the wording of the proposed defense was imperfect — *e.g.*, clarity was needed regarding the meaning of “units sold” — it seemed entirely appropriate that if the NYAG were to promulgate rules regarding how to establish a prima facie case of price gouging in the dynamic pricing context (under Section 396-r(3)(b)), the rule should also clarify how a defendant may rebut such a case). It was also consistent with Section 396-r(3)(c)’s preservation of any seller’s ability to maintain profit margins before and during a disruptive event. As the NYAG has acknowledged, the statute is not designed to bar companies from profiting, even if that involves increasing prices during a disruption:

First, the heart of the statute is a prohibition on firms taking advantage of an abnormal market disruption to unfairly *increase* their per-unit profit margins. Firms are allowed to *maintain* prior profit margins during an abnormal market disruption, and even increase total profit by increasing provision and thus sales. None of the proposed rules limit any firm from maintaining the per-unit profit margin it had for an essential product prior to the market disruption, even where that means increasing prices to account for additional costs not within the control of the firm imposed on the firm for the essential product. While the statute bans profiteering, the statute does not put any seller in a worse off position than that they were in prior to the disruption.

Proposed Rule 600.5 at 17.

And given that both versions of the Proposed Rules regarding dynamic pricing

¹³ March 2, 2023 Notices of Proposed Rules (“Previously Proposed Rules”) at 29, *available at* https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf.

acknowledge that the prices of dynamically priced goods and services can substantially vary for reasons unrelated to the disruptive event, it would also be appropriate for the affirmative defense to focus not on the profit margin for a single ride, but on the aggregate profit margin for all rides during the relevant time periods. Proposed Rule 600.5 should be revised accordingly.¹⁴ To ensure that the Proposed Rules do not run afoul of the statute and a defendant’s right to present evidence supporting affirmative defenses, the NYAG should clarify that a seller is permitted to produce additional evidence like that permitted in the Previously Proposed Rules to rebut a prima facie case under each of the Rules.

b. Proposed Rule 600.4 Should Clarify the Scope of What Creates Presumptions of Unfair Leverage and What Evidence May be Presented to Rebut Those Presumptions

Proposed Rule 600.4 aims to put guideposts on Section 396-r(3)(a)(ii), which provides that the NYAG may prove a presumed violation of Section 396-r through evidence of “an exercise of unfair leverage or unconscionable means.” The proposal includes no de minimis price increase that would be exempt and appears to create a presumption of unfair leverage for *any* price increase by a seller with: (a) a market share greater than 30% in a relevant market; or (b) a market share “greater than 10% in a relevant market for that essential product and the relevant market had a Herfindahl-Hirschman Index of 1,800 or more.” Proposed Rule § 600.4(c). Under the proposal, a seller could rebut this presumption with evidence that: (1) the increase preserves the margin of profit that the seller received prior to the disruption; (2) additional costs were imposed on the seller in the scrutinized sale; or (3) “specific circumstances in the relevant market demonstrate that, immediately prior to the onset of the abnormal market disruption, the relevant market was not highly concentrated and that the seller lacked market power in the relevant market notwithstanding the seller’s market share or the Herfindahl-Hirschman Index of the relevant market.” Proposed Rule 600.4 at 5, § 600.4(d).

Lyft respectfully suggests that the NYAG clarify: (1) an appropriate manner for sellers of dynamically priced goods and services to establish the first two methods for rebuttal; and (2) that defenses other than the specific methods included in the Proposed Rule are available to rebut the Proposed Rule’s presumptions.

As the NYAG notes, Section 396-r reflects the view that “the leverage provided by the market disruption to extract a higher price . . . is what defines price gouging, not some arbitrarily drawn line of excessiveness.” Proposed Rule 600.4 at 17-18 (quoting *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 698 (1988)). Even if de minimis price increases by sellers with certain market shares *might* reflect this kind of improper leverage, that will not always be the case—particularly in markets with dynamic pricing.

The NYAG should revise Proposed Rule 600.4 to clarify that it takes more than a simple increase in price, no matter how small, to constitute unfair leverage, particularly in the context of dynamically priced goods and services. Indeed, as the NYAG has previously explained, “[a]utomatic dynamic pricing occurs when the price increases automatically” and “without human decision-making approving that increase.” See Previously Proposed Rules at 29-30. For a seller using dynamic pricing, avoiding even a de minimis increase in price and profit — and

¹⁴ Similarly, Proposed Rule 600.8 should be revised in a similar manner.

thereby avoiding a potential claim of unfair leverage under Proposed Rule 600.4 — would require near-perfect execution. This includes promptly learning of breaking news, determining whether those developments affect or threaten market conditions, calculating relevant pre-disruption benchmark levels, and making *precisely* calibrated pricing adjustments in real time in order to avoid even a de minimis lack of perfection. These are high-stakes decisions often made in fast-moving and uncertain circumstances. The presumption set forth in Proposed Rule 600.4 undercuts the ability of sellers to operate with any margin for error. The Proposed Rule should be revised to clarify that a seller may defend against allegations of unfair leverage with evidence of its efforts to comply with Section 396-r and with other evidence demonstrating that the price increase was not a result of “unfair leverage” (and, therefore, the price was not “unconscionably excessive.” *See* Section 396-r.¹⁵ To prevent such a result, Lyft respectfully recommends that the NYAG revise Proposed Rule 600.4 to expressly permit defendants to submit evidence beyond that listed in Section 396-r(3)(c) to rebut a presumption of the exercise of unfair leverage.

V. Proposed Rule 600.9 Should Be Revised to Avoid Extra-Territorial Application

Proposed Rule 600.9 would improperly expand the scope of Section 396-r to services provided outside of the NYAG’s jurisdiction. As written, the Proposed Rule would scrutinize all services “delivered in the State or provided to a person in the State, even if at the time of the sale, offer, or delivery, one person(s) providing the service is or are outside the State or one or more goods or services are associated with providing the service is or are outside the State.” Proposed Rule § 600.9(b)(2). Many rides in the New York region begin in, end in, or travel through other states. It is foreseeable that a ride could travel through both a New York region that is experiencing a disruption and another portion of New York (or another state) that is not. Fees for the portion of those rides in other states, of course, fall outside of the NYAG’s jurisdiction. In addition, Lyft respectfully recommends that the NYAG revisit Proposed Rule 600.9 such that

¹⁵ Permitting rebuttal evidence would also be consistent with the authorities NYAG relied upon to set the market share thresholds in the previously Proposed Rule 500.5. For the 30% threshold, NYAG explained that “the settled law in the United States has been that 30% market concentration presents a threat of undue concentration,” citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 364 (1963). Previously Proposed Rule at 24. In that case, the Supreme Court of the United States made clear that even when a merger produces “a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market,” the merger will be enjoined only “in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects” *Philadelphia Nat. Bank*, 374 U.S. at 363. The NYAG further explains that “the language of significant competitor comes from the work of John Kwoka, and the 10% presumption comes from the FTC presumption.” Previously Proposed Rule at 26. Neither the Kwoka article nor the relevant FTC publication appear to support a hard-and-fast 10% rule. Rather, as Kwoka explained, “[a] footnote [in the FTC publication] adds, ‘These firms usually have market shares in excess of 10%, but market shares alone are not determinative of significance.’ Despite some ambiguity in the meaning of this passage, it seems clear that market shares can be related to diversion.” John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 850 (2017) . In fact, the FTC has acknowledged that in certain situations “existing market shares may be a poor predictor.” FED. TRADE COMM’N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011, 3 n.17 (2013), available at <https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf>.

Proposed Rule 600.5(c)(1) is applied based upon the state of origin.¹⁶

* * *

For the reasons stated above, Lyft respectfully suggests that the NYAG consider modifying Proposed Rules 600.4, 600.5, 600.6, and 600.9 to provide greater clarity to businesses and to better reflect market realities.

¹⁶In addition, a rideshare company should be permitted to present evidence demonstrating what portion of any scrutinized fare applied to services provided outside of New York.

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April 14, 2025

The Honorable Letitia James
Attorney General of the State of New York
New York State Office of the Attorney General
28 Liberty Street
New York, NY 10005

Dear Attorney General James:

On behalf of our client, Curb Mobility, we write to respectfully raise concerns and submit comments regarding the New York State Department of Law's proposed rule 600.5, which seeks to clarify the determination of "pre-disruption prices" under Section 396-r of the General Business Law, New York's price-gouging statute.

Curb Mobility is a technology company that partners with thousands of for-hire vehicle (FHV) and taxi drivers across New York State to provide accessible, real-time transportation options to the public. Our client is deeply committed to serving New Yorkers—particularly during emergencies and disruptions—by maintaining fair, reliable, and transparent pricing for essential transportation services.

While we understand and fully support the Attorney General's efforts to combat exploitative pricing during abnormal market disruptions, we are concerned that certain provisions of proposed rule 600.5, as currently drafted, could inadvertently impair Curb's ability to lawfully and flexibly respond to market conditions, particularly within the unique and highly regulated framework of the for-hire vehicle and taxi industry.

We have attached our comments below.

In relation to: ***Regulatory Impact Statement, Section 2: Legislative Objectives, Rule 600.5, For-Hire Transportation Services Benchmark Date Determination.***

The proposed rules presume that any fare exceeding the median per-mile rate by more than 10% constitutes price gouging. However, such pricing variations are common in ground transportation—even outside emergency conditions. If prices at or above the median +10% are this prevalent during routine operations, it is unreasonable to treat them as presumptively unlawful during emergencies. This test risks mischaracterizing standard market behavior as exploitative.

In relation to: ***Rule 600.5, Regulatory Impact Statement, Section 2: Legislative Objectives, For Hire Transportation Services Benchmark Date Determination***

The rules offer no meaningful or actionable definition of what constitutes an “abnormal market disruption.” Rather than limiting the trigger to major, clearly defined emergencies—such as natural disasters or officially declared states of emergency—the language is broad enough to encompass everyday events like “rainstorms.” This vagueness creates significant compliance challenges. Given the complexity of pricing across transportation services and the severe penalties for non-compliance, providers and the public need clear, objective criteria to understand when the rules apply.

In relation to: ***Rule 600.5, Text of Proposed Rule, Determination of Pre-Disruption Price For Prima Facie Case, Section c, 1, i and ii.***

(c) Rules Specific to Particular Essential Products. Notwithstanding subdivision (b) of this rule, the pre-disruption price for the essential products listed in this subdivision (c) shall be determined in accordance with the appropriate provision of this subdivision (c).

(1) For-Hire Transportation Services. In determining the existence of a gross disparity in price of for-hire transportation services, the pre-disruption price and price of the scrutinized sale shall be expressed as the total amount charged to the buyer divided by the distance driven (“price per mile”). The pre-disruption price for the provision of for-hire transportation services (“a ride,” with respect to a challenged transaction for a ride, “the scrutinized ride”) shall be the higher of:

(i) the median price per mile of all rides of the same type of service sold by the seller to all buyers within any part of New York State 20 miles of any point of the route of the scrutinized ride, on the same day of the week as the scrutinized ride, within one hour of the time of day at which the scrutinized ride took place, for each of the four weeks preceding the benchmark date; or,

(ii) If the seller or the Attorney General proves by a preponderance of the evidence that it is more likely than not that (A) the price of some or all of the rides making up the median calculated pursuant to subdivision (c)(1)(i) was abnormally high or abnormally low owing to one or more seasonal events and (B) other rides taking place within 30 days before the benchmark date more closely resemble the scrutinized ride, in all relevant respects other than price, than the rides used to supply the pre-disruption price that would otherwise be set by subdivision (c)(1)(i), the median price of those other rides.

When the rules are triggered, they rely on a fare comparison framework that is not workable for transportation providers. The statute requires measuring whether a fare represents a “gross disparity” from pre-disruption pricing. However, the proposed rules do not evaluate a provider’s actual historical fares. Instead, they use a proxy based on median per-mile fares over the same time of day and day of the week during the prior 30 days, within a rolling 20-mile radius. This methodology overlooks how ground transportation fares are determined in practice—accounting for factors like traffic conditions, local demand, vehicle availability, and route complexity. Taxi fares are computed based on both time and distance. Therefore, two trips covering the same distance

can have different final fares due to traffic delays. Likewise, during events like flooding or power outages, traffic jams are anticipated to be higher, which further complicates drive times and fare comparisons.

We appreciate your office's leadership in consumer protection, and we are eager to collaborate in refining the proposed rule to better reflect the nuances of the transportation industry, support service continuity during disruptions, and preserve fairness for both consumers and service providers.

Thank you for your consideration of these comments. We would welcome the opportunity to further discuss these concerns and contribute to a regulatory framework that achieves the shared goal of protecting New Yorkers while supporting innovative, essential services.

Very truly yours,

A handwritten signature in black ink, appearing to read "John M.", with a long, sweeping horizontal stroke extending to the right.

John L. Mascialino

BEFORE THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

**In response to:
Notice of Proposed Rulemaking Pursuant to N.Y.
Gen. Bus. L. § 396-r(5) (Price Gouging)**

Submitted: April 14, 2025

**COMMENTS OF
UBER TECHNOLOGIES, INC.¹**

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Attorney for Uber Technologies, Inc.

Introduction

Uber appreciates the work of the Office of the Attorney General (“OAG”) in creating a specific rule to address the unique aspects of New York’s for-hire transportation services industry. The importance of a rideshare-specific rule was a key aspect of Uber’s prior public comment and discussions with OAG staff.² Uber is committed to fair pricing practices, and it has a long history of working proactively to protect consumers during emergencies.

Since 2014, Uber has deployed a framework that has kept fares reasonable, ensured driver compensation, and maintained service reliability during periods of abnormal demand. This framework leverages the benefits of dynamic pricing—which can elicit additional supply when riders most need transportation—to ensure that New Yorkers can get where they need to be even in challenging conditions, while still protecting New Yorkers from unexpectedly high prices. Uber supports efforts to reasonably and fairly enhance price gouging protections, and commends OAG’s goal to provide clearer guidance to companies.

Uber, however, has profound concerns about the approach of Proposed Rule 13 N.Y.C.R.R. § 600.5, especially in conjunction with Proposed Rule 13 N.Y.C.R.R. § 600.6. In short, the definition of price gouging does not fit and has failed to consider industry realities, as empirical data

¹ “Uber” or “the Company” herein refers to Uber Technologies, Inc. and its affiliates including but not limited to Uber USA, LLC, and Rasier-NY, LLC. Uber USA, LLC is a licensed High-Volume For-Hire Service as defined in New York City Administrative Code § 19-502. Rasier-NY, LLC is a licensed Transportation Network Company as defined in Vehicle and Traffic Law § 1691.

² Uber’s prior public comment is attached as Exhibit A and incorporated herein.

demonstrates that around 40% of for-hire vehicle (“FHV”) and taxi fares during normal operations would arguably violate the rules. Further, the proposed rules compound uncertainty over *which* “abnormal market conditions” trigger fare restrictions, let alone *what* the restrictions, when triggered, require. More specifically:

- First, the proposed rules say that any 10% increase from median per-mile fare is presumptively price gouging. But even during normal course operations, FHV and taxi fares exceed this percentage increase about 40% of the time. When fares routinely differ so widely absent any condition that could constitute an “abnormal market disruption,” the mere fact that the usual pattern persists during an emergency is not evidence of price gouging.
- Second, the proposed rules do not provide actionable guidance on what constitutes an “abnormal market disruption,” suggesting that their restrictions might apply not just during disasters like hurricanes and similar Governor-declared states of emergency, but to a far broader and vaguer set of events including “severe rainstorm[s].” Given the complexity of dynamic pricing and the severe and unfair penalties threatened by New York’s price gouging law, companies and the public need clear, actionable guidance—so they know in real time whether its restrictions apply.
- Third, when the proposed rules’ fare restrictions apply, Uber cannot tell what the rules require it to do. Under the statute, if a company raises prices to create a “gross disparity” with pre-disruption prices, it has presumptively price gouged. But the proposed rules do not measure Uber’s pre-disruption prices, as the statute requires. They look only at median per-mile fares, judged at the same day of the week and time of day for the prior 4 weeks across a rolling 20-mile radius. In the real world, however, Uber’s fares depend on myriad additional factors, and the 20-mile radius forces apples-to-oranges comparisons. More than that: Uber *cannot* in real time perform the calculation that the proposed rules require.

This failure to consider the relevant and available data is a recipe for uncertainty, disputes, and unintended consequences that thwart the purpose of New York’s price gouging law. If New York adopts an unreasonably broad definition of price gouging, it will force for-hire transportation providers to change their pricing models to avoid failing the arbitrary test. This may result in increased prices *at all other times*. Drivers will earn less. Reliability will suffer, as riders who depend on surge pricing to induce additional drivers to serve busy areas instead find themselves stranded. Constrained pricing flexibility will mean fewer options for consumers. These harms will be felt across New York, but especially among New York City’s outer boroughs, upstate cities, and rural communities. Small businesses, like the driver-entrepreneurs who earn on the Uber platform, will lose critical income. In areas underserved by public transportation, small businesses depend on rideshare services to bring their customers and employees to them—and get their customers and employees home safely.³ These small businesses, including bars, restaurants, hotels, and entertainment venues, will suffer as increased ground transportation fares make living,

³ Uber plays a critical role in reducing drunk driving throughout New York. A 2017 study estimated that the introduction of Uber in New York City led to “a 25-35% decrease in the alcohol-related collision rate for the affected New York City boroughs, or about 40 collisions per month.” Jessica Lynne Peck, *New York City Drunk Driving After Uber 1* (City Univ. of N.Y., Econ. Working Paper No. 13, 2017).

working, and enjoying New York more costly—especially for those lower income New Yorkers who may not have access to a personal vehicle.⁴

In these comments, Uber proposes an alternative formula that safeguards New Yorkers from price gouging while accounting for the unique dynamics of the ground transportation market. Based on its extensive experience responding to emergencies in New York and other jurisdictions with comparable price gouging statutes, Uber continues to maintain that regulating surge multipliers remains the most effective and administrable method for addressing fare fluctuations during emergencies in a two-sided marketplace. Nevertheless, should OAG choose to pursue alternative, untested, post-hoc regulatory frameworks, Uber urges that any such approach must at a minimum address the critical shortcomings in the current proposed rules. Specifically, an effective alternative must: (1) clearly define triggering events for regulatory oversight; (2) ensure comparisons between impacted trips and a carefully selected, pre-disruption basket of rides that closely match in time, location, and trip characteristics; and (3) identify “gross disparities” in a way that reflects both industry practices and the statutory language. Uber outlines below a potential methodology that improves upon the proposed rules in each of these respects, though the model may still yield false positives and presents additional concerns.

While Uber ultimately maintains that a cap on surge pricing is the only truly workable and legally sound approach, it nevertheless presents a possible post-hoc testing framework as an alternative, which more effectively accounts for normal fare variability than the OAG’s current proposal. This alternative relies on a common methodology: defining “abnormal market conditions” based on a Governor-declared state of emergency or other clearly administrable trigger; excluding fare components beyond Uber’s control (e.g., taxes, fees, and tolls) to isolate an “evaluation fare”; and identifying comparator rides that closely resemble the scrutinized trip in time, geography, trip profile, and service type.

Uber stands ready to continue working with OAG to refine an approach to regulating pricing in true emergencies that is fair for all New Yorkers, workable for for-hire transportation providers, and preserves the reliability of the system on which so many depend.

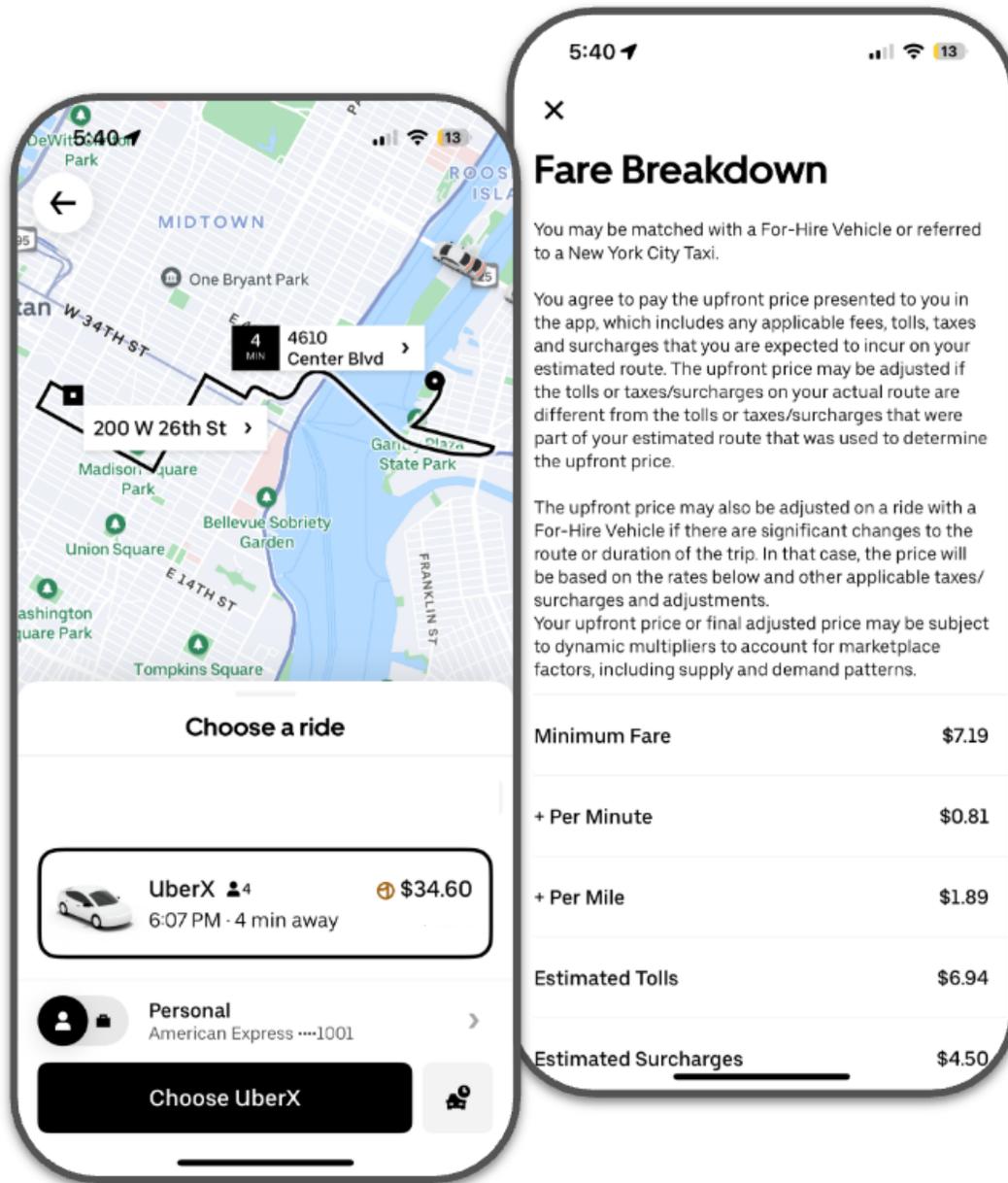
Background

A. Dynamic pricing assures reliability and accessibility for passengers and fair compensation for drivers.

Riders want (and deserve) an affordable, reliable ride every time they choose to use a for-hire transportation service. When riders open the Uber App and enter their trip’s pickup and dropoff location, they see an upfront fare before requesting a trip. These upfront price estimates are based on a variety of data points, including the estimated time and distance from origin to destination, localized real-time supply and demand patterns, regulatory requirements, and other marketplace factors. The upfront price will also include expected tolls, taxes, surcharges, and fees. In advance of booking a ride, riders can view the components of their upfront fare.

⁴ In New York City, the average income of a car owner is \$90,100; the average income of a non-car owner is \$45,769. See Hunter Urban Plan. & Pol’y Studio, *Shifting Gears: Transitioning to a Car-Light New York City* (2024), <https://www.hunterurban.org/wp-content/uploads/2024/06/Car-Light-NYC-Studio-May-2024.pdf>.

Figure #1: How Uber empowers customers with fare information

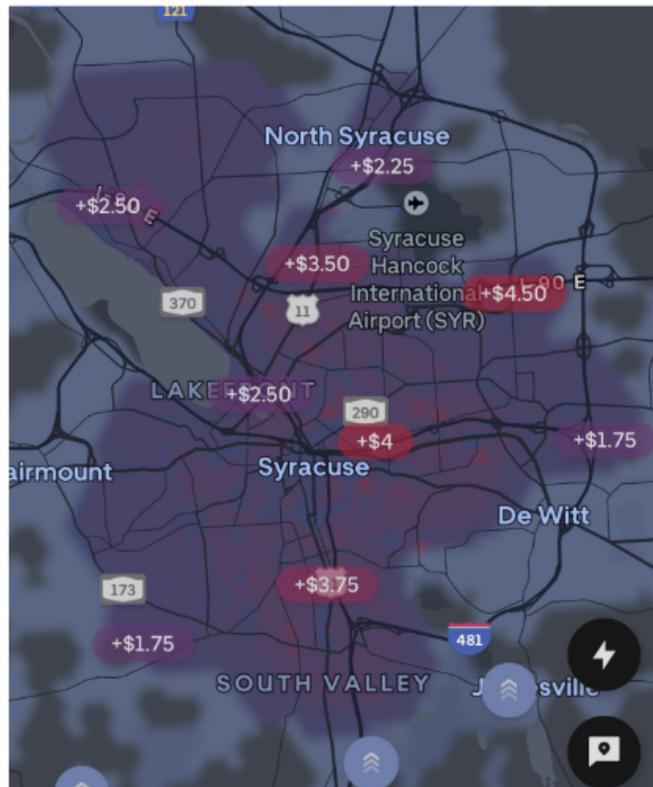


Uber Rider App: Product Selector & Fare Breakdown Screens

Uber uses dynamic pricing to attempt to balance supply and demand for rides at all times. Surge pricing balances supply and demand by acting as an incentive for drivers to drive to locations where demand exceeds supply, and for riders to request fewer trips in those areas. Without dynamic prices, a sharp increase in demand for trips—for example, during rush hour—“can trigger

what researchers have called a ‘wild goose chase.’”⁵ When there are not enough drivers nearby to absorb the increase in demand, available drivers travel longer distances to pick up riders, leading to longer wait times and some ride requests going unfulfilled.⁶ Through dynamic pricing, Uber is able to increase prices to balance supply and demand at a hyper-local level, making service more reliable for riders and helping those who need a ride the most to get one. Dynamic pricing means that fares are increased only when necessary, and fares are affordable overall and especially during times of relatively low rider demand (off peak), including in rural and suburban areas with less dense ridership than city centers. During times of increased rider demand, the Uber Driver App shows drivers surge incentives, measured in terms of dollars per trip, on a map based on a driver’s location. If drivers drive into one of the surge zones, they receive the cash incentive on their next trip—whether that trip starts in the surge zone or not.

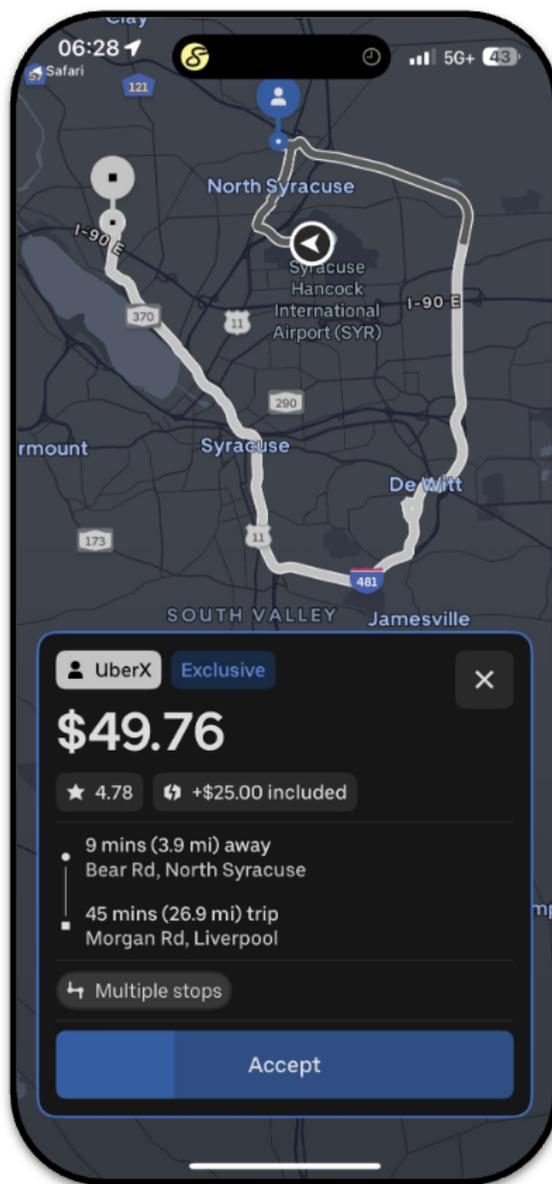
Figure #2: How Uber provides actionable surge data for drivers.



Uber Driver App: Driver surge incentives depicted geographically

⁵ *The Power of Pricing: Balancing Rider Expectations and Driver Needs*, Uber Under the Hood (Apr. 4, 2025), <https://medium.com/uber-under-the-hood/the-power-of-pricing-balancing-rider-expectations-and-driver-needs-3eb548a4d2ee>.

⁶ *Id.*



Uber Driver App: \$25 Driver Surge Incentive applied to Syracuse trip

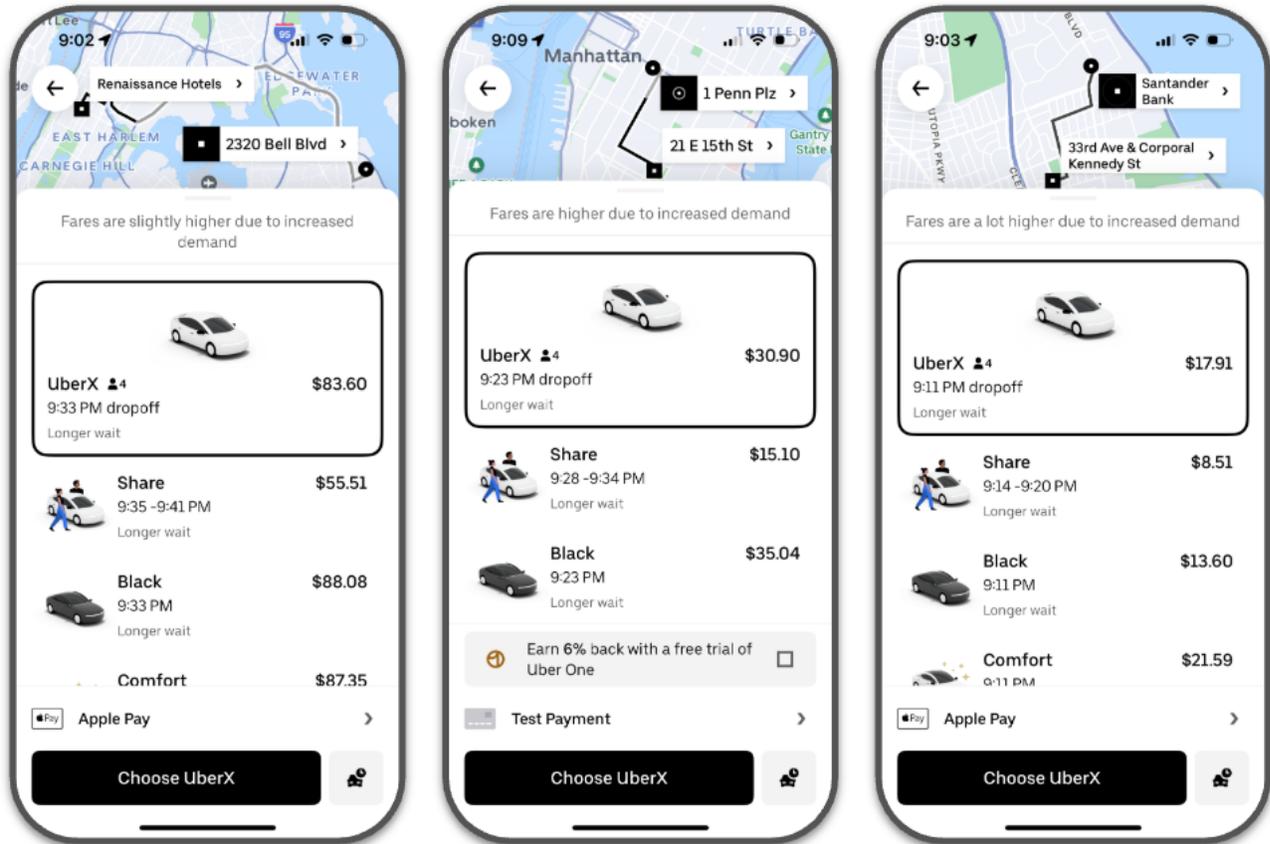
Surge pricing not only ensures that drivers meet rider demand, but also makes it possible to meet numerous New York state and local regulatory requirements, including minimum pay standards for drivers. Drivers outside of New York City must make \$27.58 per hour, an obligation set by the Assurance of Discontinuance agreement between OAG and Uber.⁷ In New York City, drivers must also earn pay rates mandated by the Taxi and Limousine Commission (“TLC”) for both time and distance. For trips within NYC, TLC’s distance pay rates currently range from \$1.414 per mile to

⁷ See Assurance of Discontinuance ¶ 30, *In re Investigation of Uber Technologies Inc.*, AOD No. 23-040 (N.Y.O.A.G. Nov. 1, 2023), <https://ag.ny.gov/sites/default/files/settlements-agreements/uber-lyft-aods.pdf>.

\$1.829 per mile; and the time pay rate is at least \$0.605 per minute.⁸ TLC data from February 2025 shows that the mean hourly earnings for NYC drivers is \$59 per on-trip hour.⁹

For riders, when prices are higher due to increased demand, the Uber App will display a message within the App notifying them that prices are higher than usual. Uber also offers riders a “Wait & Save” option, allowing riders to pay a lower price by agreeing to wait slightly longer for a ride if necessary.

Figure #3: How Uber informs riders that prices are higher than usual

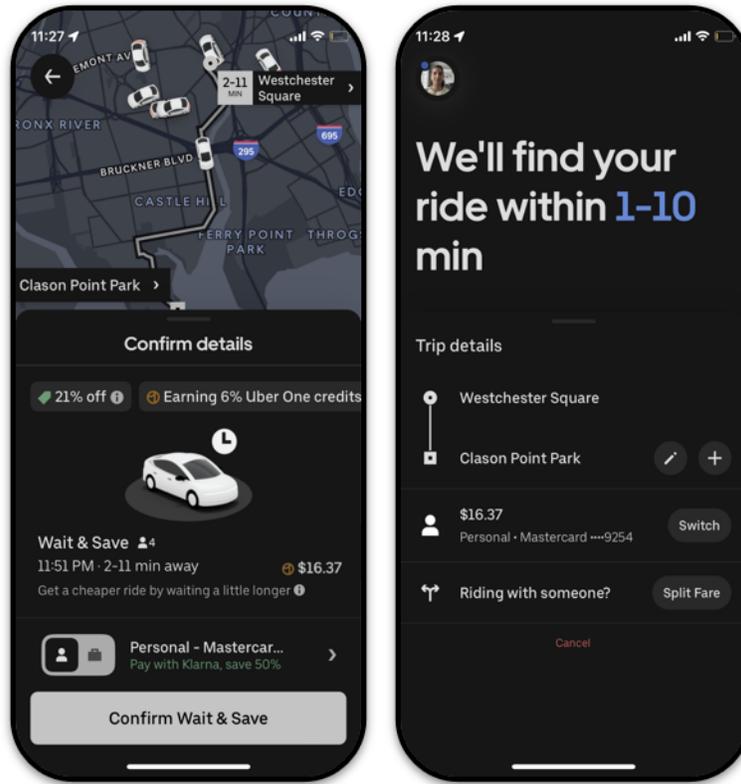


Uber Rider App: Product Selector Screens with Surge Notifications

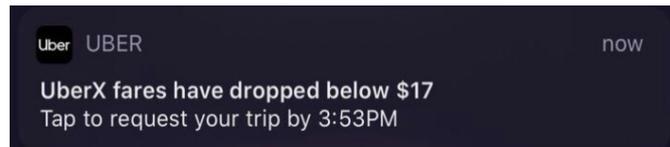
⁸ *Driver Pay Rates*, NYC Taxi & Limousine Comm’n, <https://www.nyc.gov/site/tlc/about/driver-pay-rates.page> (last accessed Apr. 14, 2025).

⁹ *Driver Pay*, NYC Taxi & Limousine Comm’n, <https://app.powerbigov.us/view?r=eyJrIjoiY2ZlbnRlbnR1eWQtdkZlODkzODU0MTQ0ODc2NzU0OTYwNjF1eWwzZjU2ZmM3LTVMODEtNGUyMi1hOTVlLTElZGE2NjUxM2JlZiJ9&pageName=ReportSection28c004ce23fc37acd783> (last accessed Apr. 14, 2025) (attached as Exhibit B).

Figure #4: How Uber provides options so that customers can wait and save



Uber Rider App: Wait & Save Product



Uber Rider App: Fare decrease “push” notification

Some riders will choose to pay for a ride to begin sooner, while others will choose to wait a few minutes until fares normalize. Just as drivers receive notifications allowing them to identify nearby areas with higher demand and thus increase their earning potential, riders are notified of higher fares and can choose to wait until fares decrease, at which point they will be notified in the App.

B. When New York and other jurisdictions have addressed the unique challenges of regulating dynamic pricing in emergencies, they have done so by limiting surge multipliers and relying on clear triggers.

Uber does not engage in the conduct targeted by price gouging laws like Section 396-r. As the OAG Staff Report explains, price gougers change their pricing behavior to exploit crises, “merely tak[ing] 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.”¹⁰ “It is this unproductive and unfair extraction of profits from disasters that the price gouging statute narrowly targets.”¹¹ Uber does not change its pricing model to exploit crises. To the contrary, Uber voluntarily limits surge multipliers during crises, even as it remains focused on ensuring reliable service in times of increased demand through targeted incentives to drivers. And unlike the unproductive and unfair pricing behavior that price gouging statutes target, Uber’s surge multipliers work precisely to bring additional supply to market—ensuring that New Yorkers can get where they need to go in challenging conditions.

Uber also mitigates another problem that the OAG Staff Report identifies as contributing to successful price gouging—that “consumers lack the information and ability to evaluate whether [price] increases are pretextual and are not able to comparison shop.”¹² Uber provides riders with information immediately when they open the Uber App that not only warns them that fares are higher due to increased demand but offers comparison shopping for different, discounted Uber services, including the option to “Wait & Save” described above, as well as public transit options if available. Riders can also simply open a competitor’s application to comparison-shop in seconds.

Uber recognizes that the issue addressed by the proposed rules—how to regulate dynamic pricing during emergencies—is an important public policy question. The stakes are high. Consumers should receive prices that are fair. Uber is intent on avoiding even an *appearance* that its dynamic pricing is attempting to take advantage of emergencies. That perception would be bad for Uber’s brand, bad for its relationships with riders and drivers, and bad for its bottom line.

Regulations, however, must not undermine the myriad benefits that dynamic pricing brings, including in emergencies and other times of disruption. Dynamic pricing ensures that riders can *actually get* rides when needed and that Uber can cover the compensation for drivers required by New York law. Regulation, if not done carefully and with attention to the specific features of dynamic pricing in the for-hire transportation industry, could upend this delicate balance, harming riders, drivers, and the public good. To protect public safety, rules in this area must provide guidance, be actionable, and be supported by industry experience.

New York in 2014 led the way in pioneering such an approach via an agreement with Uber. This agreement capped surge pricing at the level reached on the fourth-highest day in the 60 days prior to the emergency. Pursuant to that agreement, when emergencies have struck communities across New York State, Uber has kept prices low, ensured that drivers are compensated, and maintained reliability by incentivizing supply during periods of abnormal rider demand. Although this agreement expired in 2017, it continues to guide Uber’s operations today.

Uber has a dedicated team, the National Security Center (“NSC”), that monitors news outlets, social media, official emergency management notifications, and real-time market metrics across the United States. This team operates 24/7 and, in consultation with Uber’s City Operations team, can implement a surge cap based on states of emergency or other events. Once a surge cap is in

¹⁰ Off. of the New York State Att’y Gen., Econ. Just. Div., *Price Gouging Economics and Price Volatility* 12 (2025) (hereinafter “OAG Staff Report”)

¹¹ *Id.*

¹² *Id.* at 12.

place, the NSC continues to monitor the affected market. Surge caps can be removed or expanded depending on the ongoing market response to any situation. The NSC acts immediately on Governor-declared emergencies. Surge caps are put in place in the specific areas named in these orders. The NSC also monitors reports of local safety events from public sources, police, or emergency responder communications (e.g., fires, winter storms, protests, active shooters) that do not result in official declarations. Surge caps are put in place in response to events that could impact rider, driver, or public safety.

Recognizing the complexity of the task, all nine jurisdictions with rideshare-specific emergency pricing rules have adopted the same basic approach as New York did in 2014—restraining the use of algorithmic multipliers. As an early mover, OAG specifically encouraged other jurisdictions to adopt this approach. In 2014, OAG called its surge cap formula “a model for the kind of effective collaboration that should exist between government and technology companies like Uber.”¹³ In a press release, Attorney General Schneiderman declared he was “particularly proud that Uber is adopting a similar policy nationwide.”¹⁴

Because of its past support of this “nationwide” model, OAG should evaluate the surge caps adopted by sister jurisdictions. New York’s neighbor Connecticut imposes a limit of a 2.5x multiplier on dynamic pricing during times of emergency as declared by the Governor. The other jurisdictions—the District of Columbia, Massachusetts, Nebraska, Nevada, Pennsylvania, Rhode Island, Washington state, and the City of Burlington, Vermont—have variants on this approach (Table 1). All of these jurisdictions, moreover, properly recognize the importance to all concerned of clear rules and so limit the application of these measures to declared emergencies. The OAG has not provided a reasonable basis in the record to deviate from this existing and established regulatory practice.

¹³ Press Release, *A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters*, Office of the New York State Attorney General (July 8, 2014).

¹⁴ *Id.*

Table 1: All Jurisdictions with Rideshare-Specific Rules Restrain Algorithmic Multipliers During Declared States of Emergency.

Jurisdiction	Law
Connecticut	No transportation network company shall increase the price of a prearranged ride to more than two and one-half times the usual price charged for such prearranged ride in an area which is the subject of any disaster emergency declaration issued by the Governor pursuant to chapter 517, any transportation emergency declaration issued by the Governor pursuant to section 3-6b or any major disaster or emergency declaration issued by the President of the United States . Conn. Gen. Stat. § 13b-118.
District of Columbia	During a state of emergency declared by the Mayor , a digital dispatch service which engages in surge pricing shall limit the multiplier by which its base fare is multiplied to the next highest multiple below the three highest multiples set on different days in the sixty (60) days preceding the declaration of a state of emergency for the same type of service in the Washington Metropolitan Area. 31 DCMR § 705.12.
Massachusetts	A transportation network company and driver shall not raise base fares during a federal or a governor-declared state of emergency . Mass. Gen. Laws ch. 159A ½ § 2.
Nebraska	Dynamic pricing shall not be permitted during any state of emergency declared by the Governor . Neb. Rev. Stat. § 75-327.
Nevada	During an emergency , as defined in NRS 414.0345, a transportation network company shall not charge a fare in excess of the base rate on file with the Authority on the date of the emergency. Nev. Admin. Code § 706A.290.
Pennsylvania	Limitation.--When a state of disaster emergency is declared under 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (relating to general authority of Governor), a transportation network company that engages in dynamic pricing shall limit the multiplier by which its base rate is multiplied to the next highest multiple below the three highest multiples set on different days in the 60 days preceding the declaration of emergency. 66 Pa. Stat. and Cons. Stat. Ann. § 2607.
Rhode Island	The division shall require transportation network companies to establish and implement a written policy capping dynamic pricing during disasters and relevant states of emergency and make this policy available on its website or application. 39 RI Gen. Laws § 39-14.2-3.
Washington	During the first seven days of a state of emergency, as declared by the governor or the president of the United States , a transportation network company may not charge a fare for transportation network company services provided to any passenger that exceeds two and one-half times the fare that would otherwise be applicable for the prearranged ride. Wash. Rev. Code Ann. § 46.72B.050.
Burlington, VT	Licensees shall establish and implement a written policy capping dynamic pricing during disasters and relevant states of emergency and shall make this policy available on its website or application. Burlington, VT., Vehicles for Hire Ordinance, ch. 30, art. 9, § 30-24(b).

In its Staff Report and proposed rules, OAG surveyed price gouging rules across the United States extensively. OAG noted that several jurisdictions—such as Connecticut—apply “what is effectively a 0% threshold: any non-cost justified price increase of an essential product constitutes price gouging.”¹⁵ Yet in its rationale for an industry-specific rule, OAG failed to consider how any sister jurisdictions apply price gouging rules *in the specific context of dynamic ground*

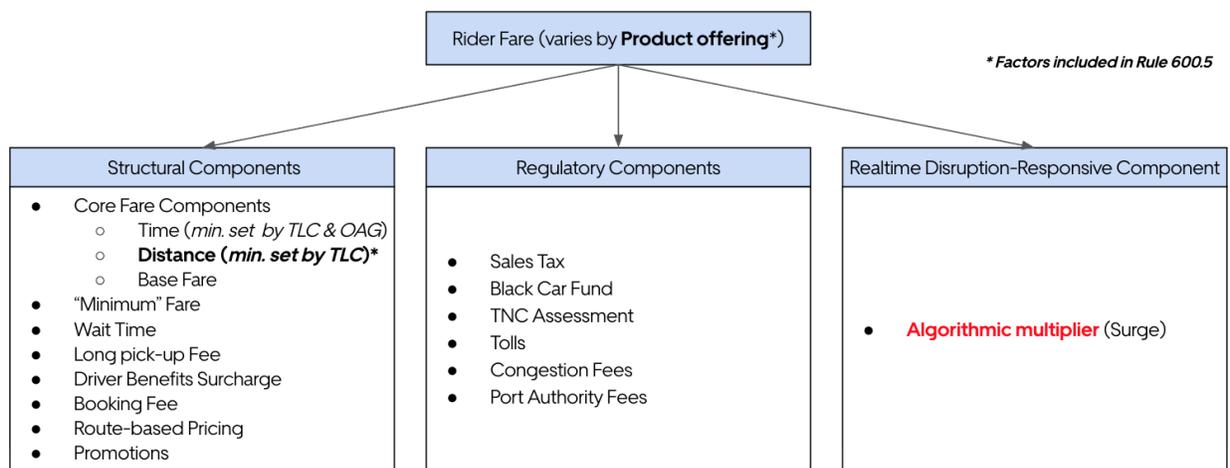
¹⁵ Off. N.Y. Att’y Gen., *Price Gouging: Notice of Proposed Rulemaking: Proposed Rule 600.6 - Gross Disparity Threshold* 20 (Feb. 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.6-gross-disparity-threshold.pdf>.

transportation fares.¹⁶ As noted in Table 1, all jurisdictions restrain algorithmic multipliers. Even Connecticut—whose legislature sets a stricter 0% standard for price gouging – relies on the restraint of a multiplier following a declared emergency. Rather than review industry data, or evaluate the approaches of neighboring states, OAG created an untested approach from whole cloth without an adequate basis. Ignoring neighboring jurisdictions in this way makes little practical sense, as emergency conditions will often impact New York and its neighboring states simultaneously.

C. The proposed rules create a novel approach that departs from sister jurisdictions.

The proposed rules do not attempt to adjust or reform the framework that has worked since 2014 and that prevails in all of New York’s sister states, such as by picking a different limit for surge multipliers. The proposed rules instead jettison that framework entirely in favor of a new and untested approach. First, Proposed Rule 600.5(c)(1) defines the “pre-disruption price” for for-hire transportation services as the “median price per mile of all rides of the same type of service sold by the seller to all buyers within any part of New York State 20 miles of any point of the route of the scrutinized ride, on the same day of the week as the scrutinized ride, within one hour of the time of day at which the scrutinized ride took place, for each of the four weeks preceding the benchmark date.” The rule thus fails to consider the myriad other factors, described below, that account for the price of for-hire transportation—many mandated by law.

Figure #5: Components of Uber fares



Second, Proposed Rule 600.6(a) deems any price “greater than 10% of [an] essential product’s pre-disruption price” as a “gross disparity,” rendering that price presumptively unlawful. This presumption applies across the board, including to for-hire transportation services, during “any abnormal disruption of the market.”

¹⁶ In defining “gross disparity,” OAG’s found support for its position in “regulatory harmonization” with neighboring New Jersey, the “entrepot for goods sold in New York.” *Id.* at 21. The need for “regulatory harmonization” applies with added force to the movement of people during “abnormal disruptions.” New Yorkers frequently take Uber trips to or from neighboring Connecticut, Pennsylvania, and Massachusetts—all jurisdictions that restrain algorithmic multipliers. Disasters and emergencies often have a regional impact; necessitating “regulatory harmonization.”

An “abnormal disruption” is defined vaguely as “any change in the market for an essential product, whether actual or imminently threatened, resulting from “(i) stress of weather, (ii) convulsion of nature, (iii) failure or shortage of electric power or other source of energy, (iv) strike, (v) civil disorder, (vi) war, (vi) [*sic*] military action, (vii) national or local emergency, (viii) drug shortage, or (ix) other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the Governor.”¹⁷ The proposed rules’ untested approach will thus apply in an undefined set of circumstances that regulated entities cannot reliably identify in real time.

Discussion

While Uber commends the OAG’s efforts to create specific rules for dynamic pricing in for-hire transportation services, Uber has significant concerns about the proposed rules’ methodology and approach. The proposed rules do not reflect how the industry works, and Uber cannot tell either *when* the proposed rules would apply or, when they do apply, *how* Uber must operate. Enacting the proposed rules as written would have severe unintended consequences, harming riders and drivers alike, as well as violating the statute and OAG’s obligation to promulgate rules that are supported by evidence and reflect reasonable policy choices.

The better approach is to build on the successes of OAG’s 2014 framework, and the experience of other jurisdictions, by regulating surge multipliers in clearly defined emergencies. To be clear: That framework need not be set in stone, and Uber appreciates OAG’s efforts to improve it. But the 2014 approach was sound, and following it can mitigate many of the problems with the proposed rules.

I. The proposed rules, if adopted, would violate Section 396-r of the New York General Business Law and undermine the services on which both riders and drivers depend.

A. The proposed rules’ 10% threshold does not measure “gross disparities” in prices of for-hire transportation, as the statute requires.

In the for-hire transportation industry in general, and in two-sided marketplace with dynamically priced transportation services in particular, a 10% deviation from the median price (however defined) is not a “gross disparity.”¹⁸ The proposed rules identify no sound basis for applying that categorical rule to the for-hire transportation industry—and none exists. Finalizing the rules as drafted would not just violate the statute, but undermine the reliable transportation on which New Yorkers depend.

A series of figures show why a 10% threshold is not justified or rational. Using January 2025 as an example of a period of normal nonemergency conditions, 42% of fares for high-volume for-hire vehicles (“HVFHV”)—Uber and Lyft—in New York City are more than 10% above the median, as measured by the approach in Proposed Rule 600.5(b)(2)(iii) (Figure 6).¹⁹ Taxi fares are

¹⁷ Proposed Rule 13 N.Y.C.R.R. § 600.1(a)(1)-(2).

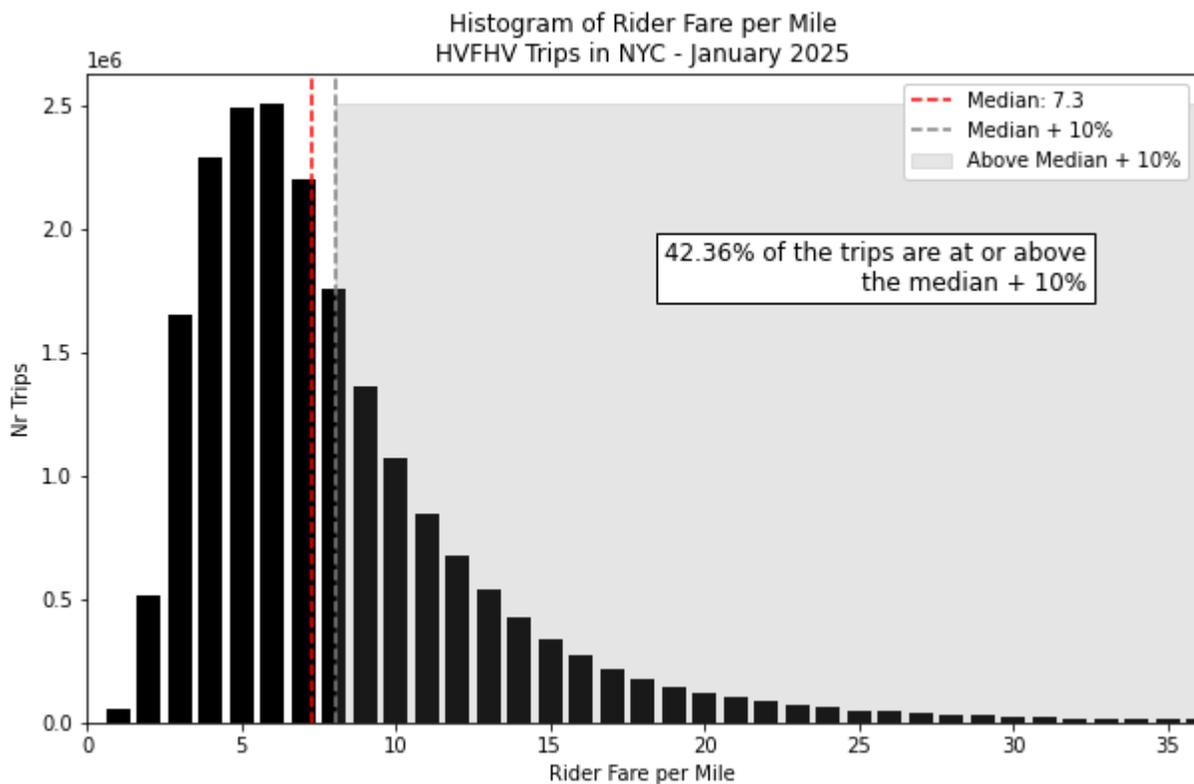
¹⁸ N.Y. Gen. Bus. Law § 396-r(3)(b)(i).

¹⁹ Figures 6 - 11 depict TLC’s publicly available data files that include every fare charged by taxis, Ubers, and Lyfts in New York City, available at *TLC Trip Record Data*, NYC Taxi & Limousine Comm’n, <https://www.nyc.gov/site/tlc/about/tlc-trip-record-data.page> (last accessed Apr. 14, 2025) (hereinafter “TLC Trip Record Data”). These figures, however, do not apply the 20 mile radius contemplated by the proposed rules. Even a

much the same, with 42% again exceeding the median by more than 10% (Figure 7). Indeed, under OAG’s proposed “general rule”²⁰ over 1.2 million NYC taxi fares would be prima facie “price gouging” *in a single month*. OAG has not explained how it considered this evidence.

Under OAG’s proposed “industry rule,”²¹ the same conclusion follows. In January 2025, applying OAG’s parameters—“same day of the week,” and “within one hour of the time of day”—shows that a 10% threshold is not justified. From 4pm to 6pm on Tuesdays, 42% of HVFHV per-mile fares are more than 10% above the median (Figure 8). During that same window, January 2025, Tuesdays, between 4 - 6 pm, 42% of taxi per-mile fares are more than 10% above the median (Figure 9).

Figure #6: HVFHV fares per mile in New York City (January 2025)



static radius measured from just the pickup location would include not just New York City, but also Westchester and Long Island. A rolling radius would be exceedingly difficult to calculate even in hindsight—and as explained below, it is impossible to calculate in real time. All figures show at least 99.5% of all fares reported to the TLC for the specified period. To avoid including reported trips that may reflect data anomalies and not completed rides, the figures exclude all trips with distance below 0.1 miles, all trips with a duration of less than 0.1 minutes, and all trips with rider fares (excluding taxes, tolls, and fees) of less than \$3.

²⁰ Proposed Rule 13 N.Y.C.R.R. § 600.5(b)(2)(ii).

²¹ Proposed Rule 13 N.Y.C.R.R. § 600.5(c)(1)(i).

Figure #7: Taxi fares per mile in New York City (January 2025)

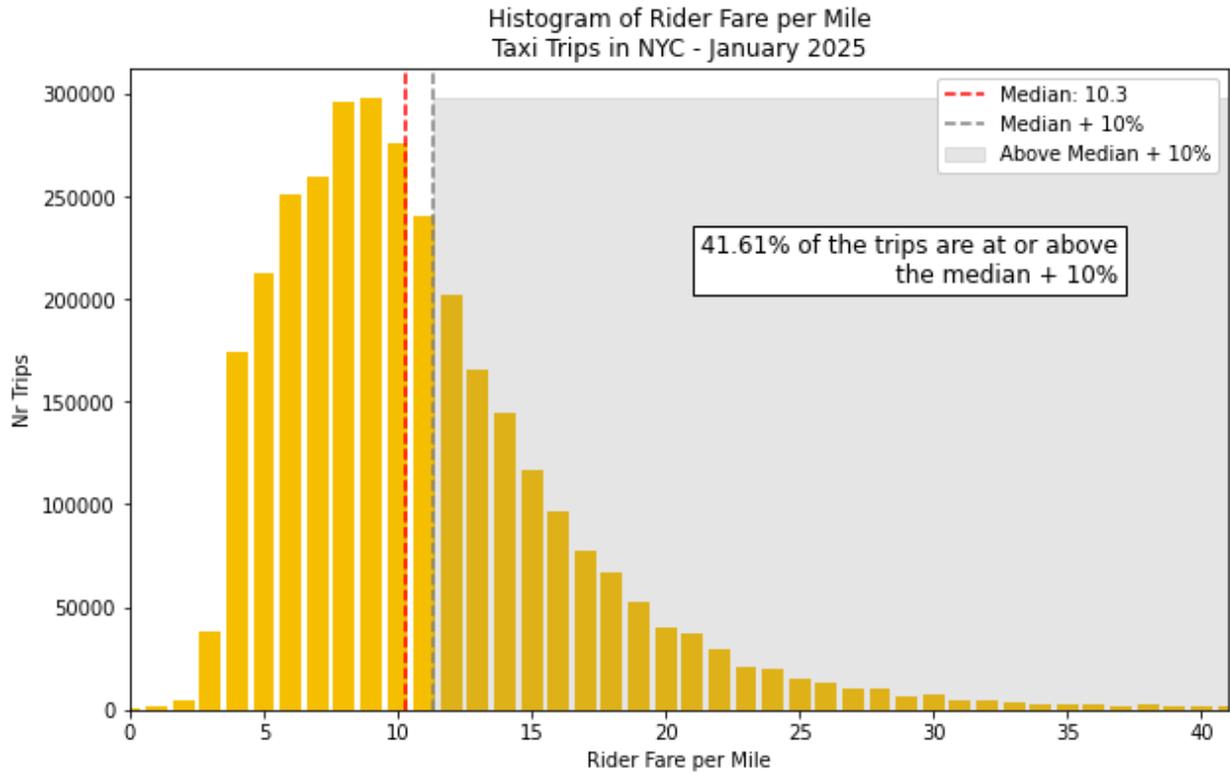


Figure #8: HVFHV fares per mile in New York City (January 2025, 4pm-6pm)

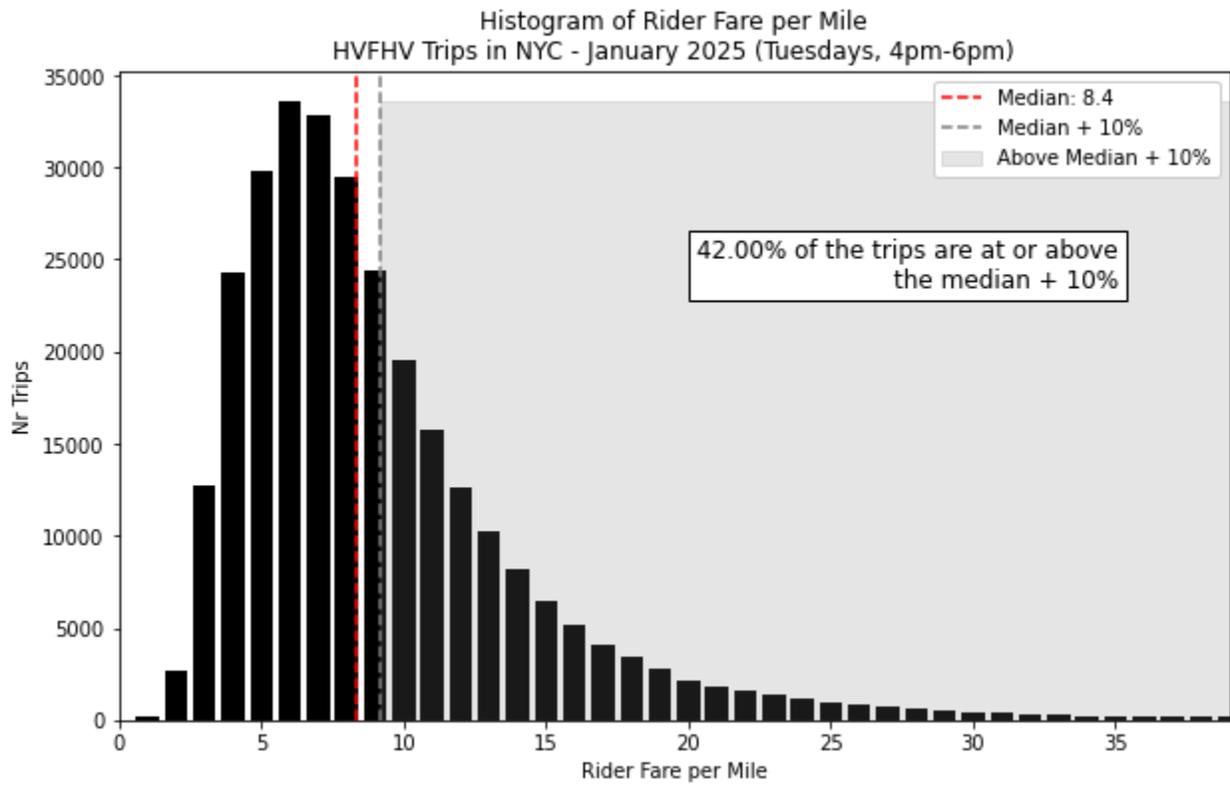
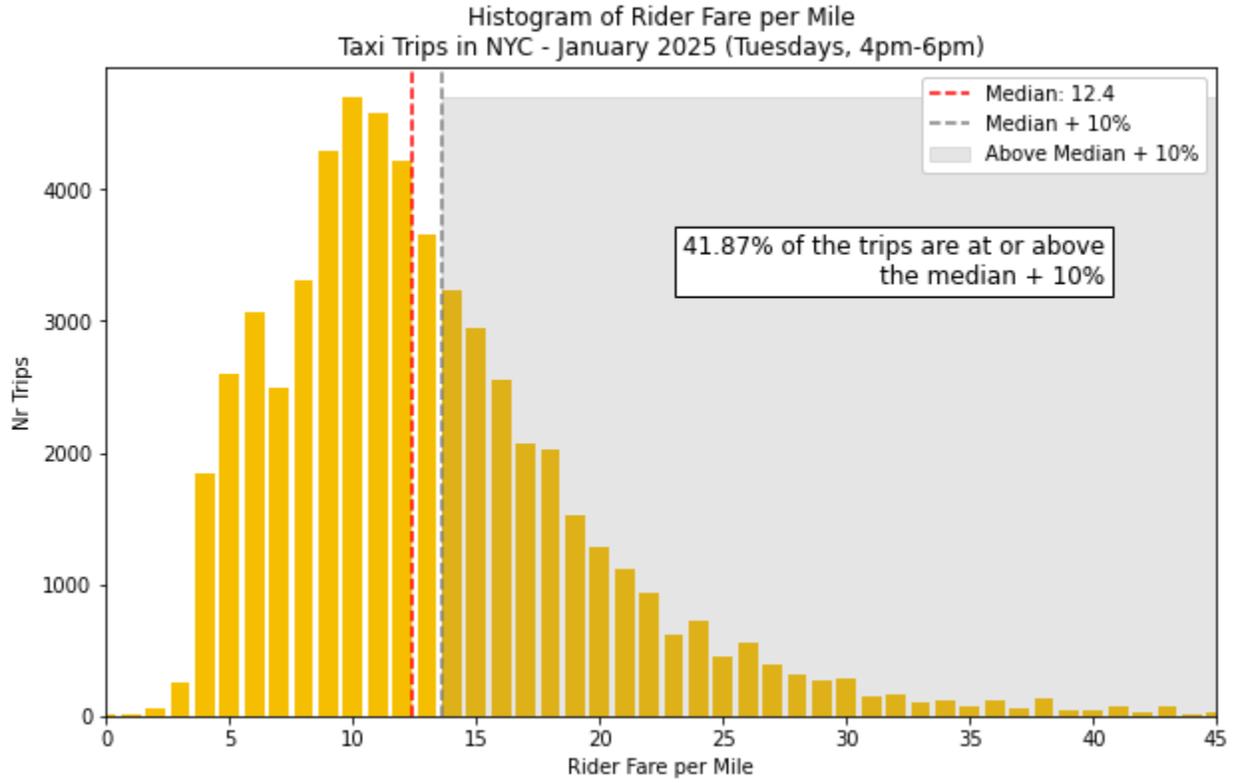


Figure #9: Taxi fares per mile in New York City (January 2025, 4pm-6pm)



Further, an analysis of *fare per minute* during the same period again underscores that a 10% threshold is not justified. From 4pm to 6pm on Tuesdays, 40% of HVFHV per-minute fares are more than 10% above the median (Figure 10). During that same window, 39% of taxi per-minute fares are more than 10% above the median (Figure 11).

Figure #10: HVFHV fares per minute in New York City (January 2025, 4pm-6pm)

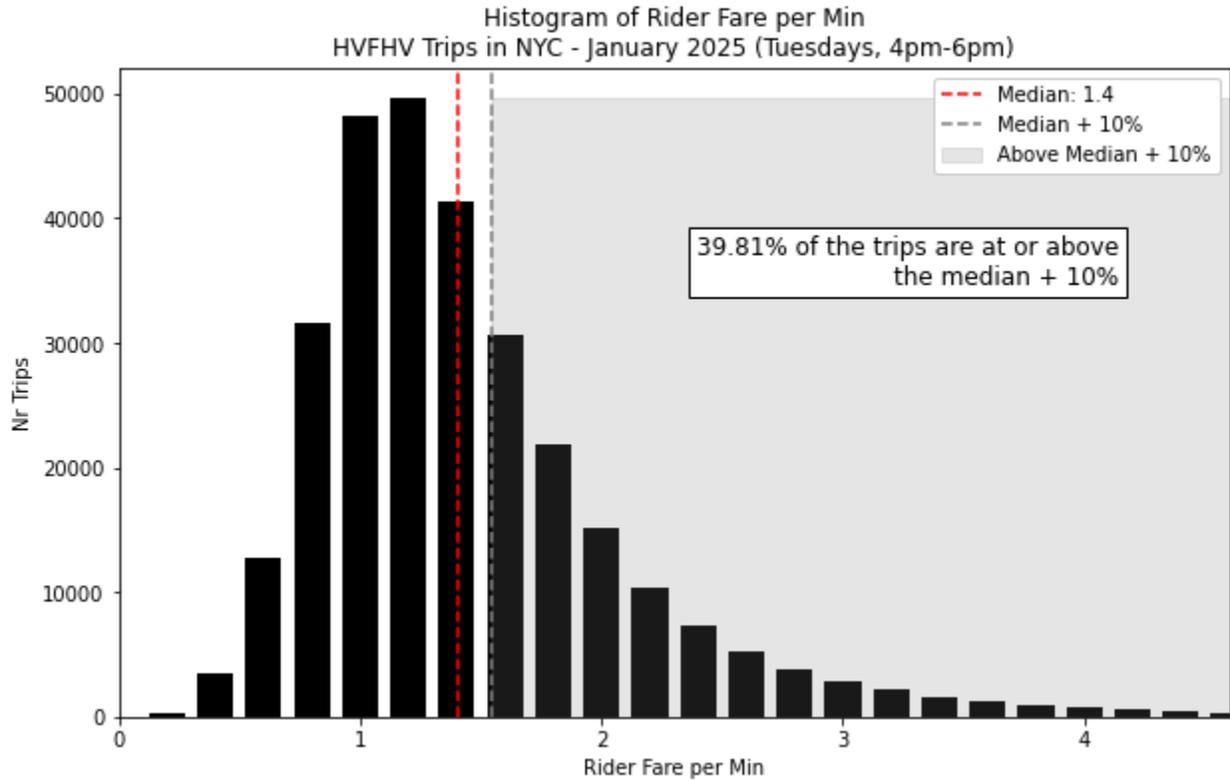
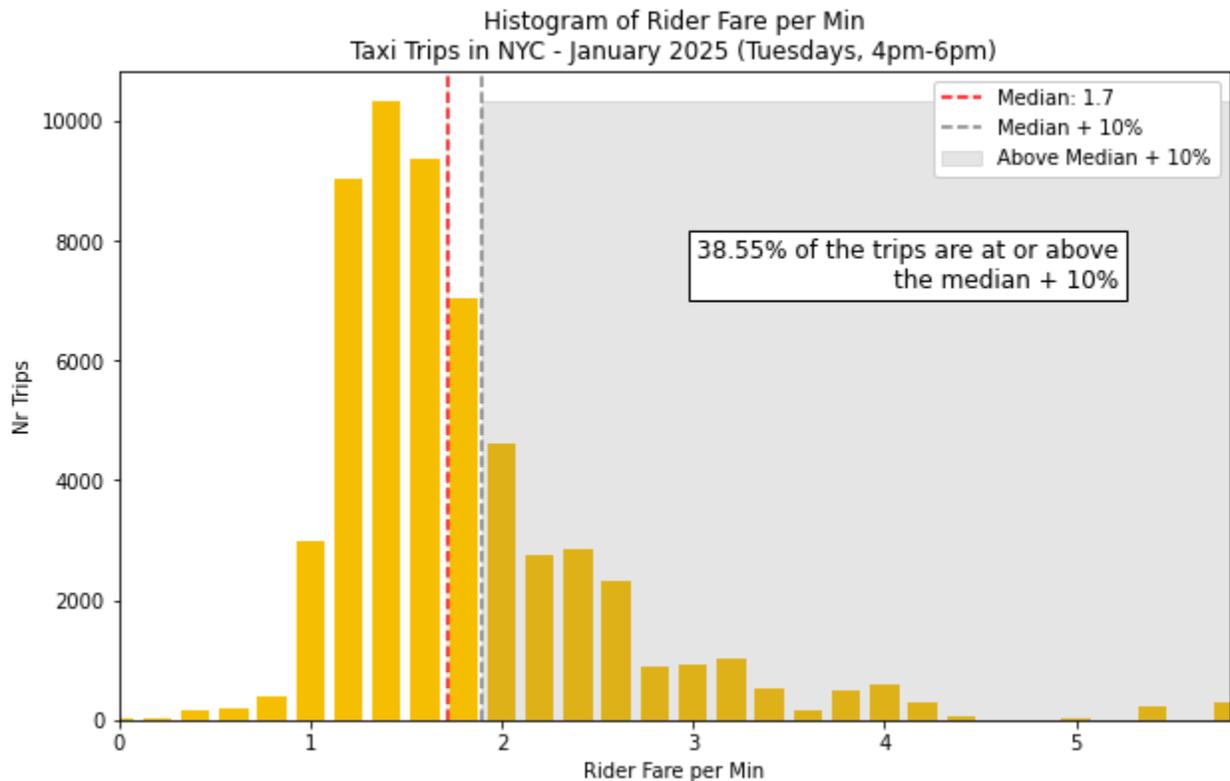


Figure #11: Taxi fares per minute in New York City (January 2025, 4pm-6pm)



A fare, or fare per mile or a fare per minute, that applies around 40% of the time *outside emergencies* cannot be a “gross disparity” that, when charged during emergencies, subjects a company to massive liability. For example, Uber and taxi rides may regularly exceed the medians (as calculated above) by 10% or more because traffic is heavy, a route incurs multiple tolls, or for dozens of other reasons. The proposed rules would prohibit those same fares if the cause of the heavy traffic was a Governor-declared state of emergency or, potentially, a very rainy day. That result makes little sense. It would also contradict the ordinary meaning of a “gross” disparity: “Gross” in the relevant sense means “[c]onspicuously bad or wrong; appalling, egregious;” or “glaring; flagrant, blatant.”²² And the 10% threshold would have devastating effects, as that draconian limit would trigger shortages that hurt the thousands of riders who depend on for-hire transportation during emergencies. With fares capped at 10% more than the median, many drivers who might have ventured out to earn the premiums from surge pricing will instead stay home.

The proposed rules base their 10% threshold on the OAG Staff Report, which “concludes that price fluctuations for a diverse basket of essential products do not usually exceed 10%” over a one-month period, “except during abnormal market disruptions caused by triggering events.”²³ But the report bases its conclusions on studies of products like wool, milk, face masks, and flour. These commodities are not relevant in the context of a two sided marketplace, where the time and location

²² *Gross*, Oxford English Dictionary, https://www.oed.com/dictionary/gross_adj (last accessed Apr. 14, 2025).

²³ OAG Staff Report at 4.

of every trip matters. For-hire transportation is not like flour. An industry-specific rule must be supported by industry-specific data and analysis. Although such data is readily available to the public, the OAG Staff Report did not attempt to study for-hire transportation fares nor try to show how its conclusions would apply to for-hire transportation.

Had OAG considered this data, it would have seen that many of the report’s premises plainly do not translate to for-hire transportation. For example, the report describes “abnormal disruptions” as events that “cause demand ... to spike so suddenly that there is often no time for supply to rise no matter how high prices go” and thus “the price being charged cannot spur additional production.”²⁴ But as explained above, this is the antithesis of surge pricing in Uber’s two-sided marketplace. Surge pricing does result in additional supply, and in real time. Indeed, surge pricing is essential to do so. Likewise, the report acknowledges that “highly complex government-constructed” regulation can “hopelessly complicate” any effort to analyze price disparities “within and without abnormal market disruptions,”²⁵ but it ignores how New York’s complex regulatory requirements for for-hire transportation—described further below—do just that.

Perhaps most important, the proposed rules do not grapple with the profound differences between flour (and the other products and services studied in the OAG Staff Report) and for-hire transportation. One bag of flour may indeed be much like another.²⁶ But for for-hire transportation, not all miles are fungible. For example, the speed of travel for a mile at 4AM on an outer borough highway one week can be vastly different from the speed at the same time just a week later if a car accident or other normal traffic occurrence causes gridlock. Indeed, as detailed above, fares consist of more than a dozen components that, even leaving aside surge multipliers, regularly vary widely—often amounting to more than 10% of the per-mile price. These components include travel time (closely related to traffic), wait time, fees for long pickups, variable government-imposed tolls and fees, and more. For example, Yellow taxi metered fares regularly fluctuate 12-15% daily due to traffic patterns, time-of-day surcharges, and toll variations.²⁷

Critically, the proposed rules fail to consider any of the complex local regulations that govern fares in New York’s ground transportation marketplace and thus drive the 10%+ deviations in fares. A \$1.50 congestion surcharge assessed by the MTA, a street closure by NYPD, or an MTA-required increase in bridge tolls may all increase Uber’s per-mile fares by more than 10%. Differences that result from legal mandates cannot be “gross disparities” under the statute, and the proposed 10% threshold would harm Uber for a cost it cannot control.

The OAG Staff Report is candid about its limitations. Although the report expressed “regret[]” that commenters had not provided data to dispute its 10% premise, the report made clear what should happen if such evidence materialized: “If, over these standard time frames, prices did indeed vary by more than 10% under normal market conditions, it would suggest that the presumptive threshold should be higher than the 10% proposal.”²⁸ Now that Uber has presented

²⁴ OAG Staff Report at 6.

²⁵ *Id.* at 29.

²⁶ *Id.* at 9.

²⁷ See TLC Trip Record Data, *supra* note 19.

²⁸ OAG Staff Report at 22.

such evidence, which was readily available for OAG to analyze, OAG should follow its Staff Report and reject the application of the 10% threshold to the for-hire transportation industry.

Nor is it an answer to say that a 10% disparity only makes out a *prima facie* case of price gouging, which can be rebutted by showing that the price increase was necessary to “preserve ... margin” or to “recover additional costs not within the control of the seller.”²⁹ The proposed rule needs a reasonable basis to apply the 10% threshold to the for-hire transportation industry. And an unreasonable 10% threshold cannot be saved by forcing companies to bear the burden to rebut it. That, to begin, would violate the statute by reallocating the burden of proof from the Attorney General to the companies.³⁰ Moreover, in the for-hire transportation industry, relying on the rebuttal grounds would be difficult if not impossible—for both Uber, as a regulated party, and for OAG, as an enforcer—because of the various components of fares and the fact that, simply put, unlike bags of flour, no two trips are the same.

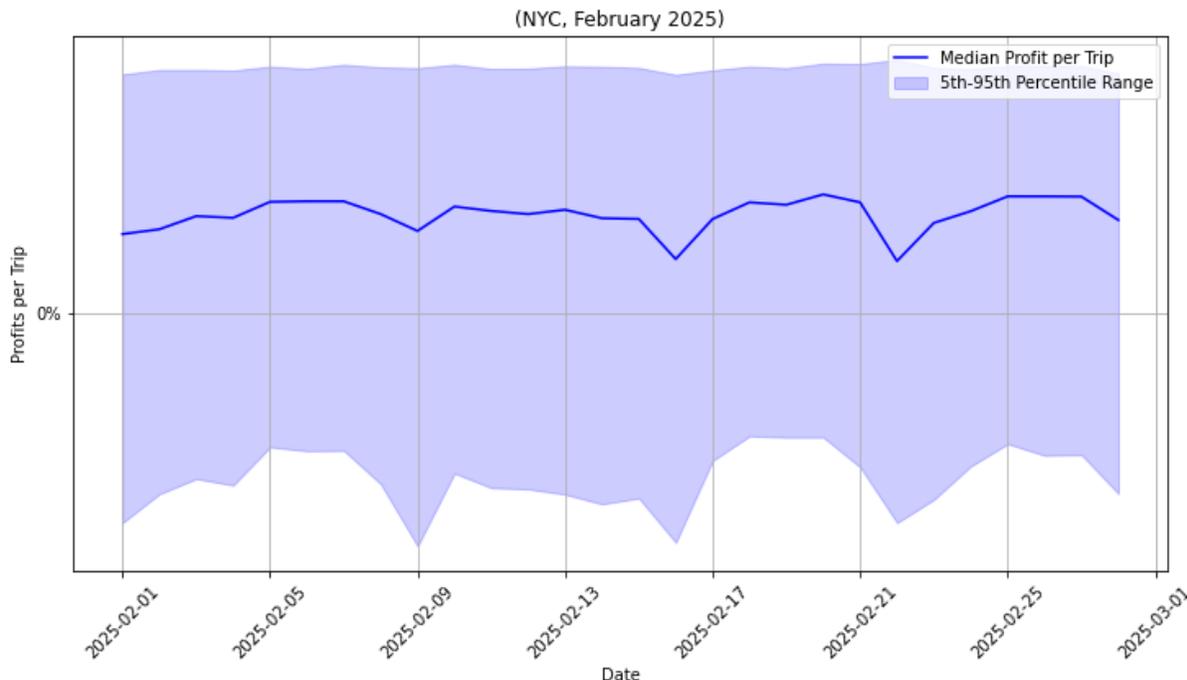
Start with margin. While a margin-based rebuttal ground may work for a retailer selling a product like a bag of flour with a stable margin, it does not work in the for-hire transportation industry. In its usual course of business, Uber does not measure its profit margin on a per-trip basis. That is for at least two reasons. First, in the for-hire transportation industry, there are too many inputs in terms of both costs and earnings to reliably calculate margin by trip. Second, Uber’s best approximations demonstrate that every trip’s individual profit margin varies widely, regularly resulting in both positive and negative margins. In its usual course of business, Uber combines hundreds of thousands of individual trips to calculate Uber’s overall margin, which varies widely both within and across days (Figure 12).³¹

²⁹ Proposed Rule 13 N.Y.C.R.R. § 600.6(b).

³⁰ See N.Y. Gen. Bus. Law § 396-r (requiring the Attorney General to establish *prima facie* proof of a violation in the first instance).

³¹ During its normal course of business, Uber sets trip prices in order to achieve optimal marketplace outcomes. Unlike other industries, in which the optimal price is constant, in industries like ridesharing it may be optimal to increase margin on some trips low in order to improve the thin margins on other trips. Uber might want to maintain supply for less profitable routes in order to move demand to more profitable areas. Similarly, in periods when driver supply is low, it may offer temporary incentives in order to maintain reliability. This temporary decrease in margins is offset by the future demand generated by stable reliability. Thus, since Uber optimizes pricing across time and geographies, looking at an individual trip is not a useful method of measuring profit, and will misrepresent the actual contribution of an individual trip to the overall portfolio. As shown in Figure 12, the pricing strategy used by Uber results in a very wide distribution of margins at the individual trip level, as well as variation over time. But once all those trips are aggregated (and other costs and benefits not immediately accrued are accounted for), overall margins are more stable.

Figure #12: Uber’s margin—range and median



This phenomenon is not unique to Uber. Variable profit margins are commonplace in the transportation sector. The airline industry, for example, experiences annual profit margins ranging between 2.7% and 42.9% across domestic routes.³² For transportation providers, where convenience and reliability are as important as profitability, per-trip or per-route economics necessarily vary.³³ And with margins so variable, Uber has no coherent way to determine when a particular post-disruption trip maintains the margin of a pre-disruption trip; any comparison would be swamped by trip-specific idiosyncrasies. Moreover, Uber defrays its costs in part by using the revenue received during rider surge pricing. Surge pricing funds the extra income drivers receive to service the areas of increased demand. But rider surge-driven revenue does not only support surge-driven driver costs; it also supports, for example, the minimum pay rates and benefits mandated by New York City and New York State.

The rebuttal ground for “recover[ing] additional costs not within the control of the seller” also does not fit or rationally relate to ridesharing services that rely on dynamic pricing. This pricing method relies on balancing demand and supply, and hence a rebuttal ground that looks to costs alone does not accord with normal business practices. Moreover, the OAG Staff Report contradicts both the proposed rule and the statute itself when it posits that a for-hire transportation service could avoid liability if it directed the entire above-median portion of the fare to drivers. Per the report, “[t]he ride-hailing service that raises driver pay for a given ride by \$X and then raises the

³² See Hakan Yilmazkuday, *Profit Margins in U.S. Domestic Airline Routes*, 114 Trans. Pol’y 245 (2021).

³³ See, e.g., Brian Taylor, Mark Garrett, & Hiroyuki Iseki, *Measuring Cost Variability in Provision of Transit Service*, (UC Berkeley: Univ. of Cal. Transp. Ctr., Paper No. 00-0793, 2010), <https://escholarship.org/uc/item/2cw9m06w>; Carol C. Huang, Chris C. Hsu, & Emilio Collar, *An Evaluation of the Operational Performance and Profitability of the U.S. Airlines*, 16 Int’l J. of Global Bus. and Competitiveness 73 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8335716>.

price of that ride by \$X has not engaged in price gouging even if \$X is a substantial sum.”³⁴ But under the proposed rule and the statute, increased costs are a defense only if they are “not within the control of the seller.”³⁵

B. By failing to define “abnormal market conditions” with clear triggers, the proposed rule threatens to undermine reliability.

As industry data makes clear, New York’s ground transportation sector, market conditions – “abnormal” or normal – affect fares constantly. Under its rulemaking authority, OAG must craft a rule that reflects the realities of this uniquely dynamic marketplace. The proposed rules’ greatest defect is the lack of a clear, actionable definition of what constitutes “abnormal market conditions” triggering a duty for for-hire transportation providers to modify their ordinary pricing practices. As OAG has long recognized, above all, rideshare companies that connect drivers and riders in a dynamic marketplace need “clarity from government about how the law will be applied.”³⁶

The rules vaguely sweep in “any change in the market, whether actual or imminently threatened, resulting from” certain disturbances including “stress of weather, convulsion of nature, ... civil disorder,” or “local emergency.”³⁷ How bad must the weather be to cause “stress?”³⁸ Does “civil disorder” include protests of a few hundred people? Thousands? Hundreds of thousands? Is a visit from the President a “local emergency”? And while the statute suggests that these terms should receive a narrow definition focused on true disasters—referring to “strikes, power failures, severe shortages *or other extraordinary adverse circumstances*”³⁹—the proposed rule exacerbates the vagueness by referring to (for example) “a severe rainstorm” as an “abnormal market condition” whose mere “imminent[] threat[]” could trigger the rule.⁴⁰

Moreover, sometimes potential “abnormal market conditions” may result from numerous overlapping events. Take, for example, the evening of March 5, 2025, when Manhattan experienced: (1) heavy rainfall during rush hour, (2) a temporary significant drop in available drivers due to observance of Ramadan, and (3) a student protest and bomb threat alert from NYPD that caused the evacuation of a college campus.

³⁴ OAG Staff Report at 19.

³⁵ Proposed Rule 13 N.Y.C.R.R. § 600.6(b); *see* N.Y. Gen. Bus. Law § 396-r(3)(c).

³⁶ Press Release, Off. N.Y. Att’y Gen., A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters (July 8, 2014), <https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and>

³⁷ Off. N.Y. Att’y Gen., *Price Gouging: Notice of Proposed Rulemaking: Proposed Rule 600.5 Pre-Disruption Price Determination* 12 (Feb. 2025), <https://ag.ny.gov/sites/default/files/2025-01/oagpg-2502-nprm-600.5-pre-disruption-prices.pdf> (hereinafter “NOPR”); *see also* N.Y. Gen. Bus. Law § 396-r(2)(b).

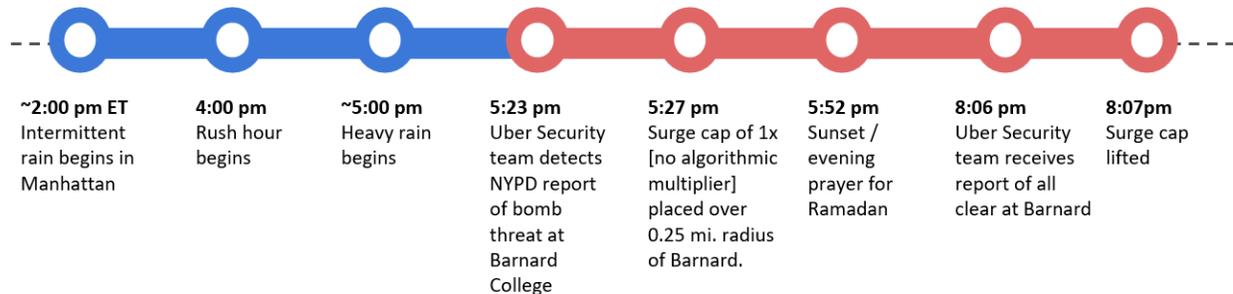
³⁸ NOPR at 12.

³⁹ N.Y. Gen. Bus. Law § 396-r(1) (emphasis added).

⁴⁰ NOPR at 12, 26. Rain, by itself, is a significant factor impacting New York’s ground transportation marketplace. *See* Abdel Brodeur & Kerry Nield, *An Empirical Analysis of Taxi, Lyft and Uber Rides: Evidence from Weather Shocks in NYC*, 152 J. Econ. Behav. & Org. 1 (2018), <https://doi.org/10.1016/j.jebo.2018.06.004>.

Figure #13 Did New York City face (and when did it face) “abnormal market conditions” on March 5, 2025?

Public Safety & Surge: NYC, March 5th, 2025



Surge pricing took effect throughout Manhattan on March 5, 2025, but Uber initiated a surge cap following the NYPD alert in accordance with the company’s emergency protocol. Under the proposed rules, did these events cause “abnormal market conditions?” And if so, did those conditions start when heavy rain began at 5pm? When the bomb threat occurred at 5:23pm?⁴¹ When drivers took a break to observe Ramadan? In a business that relies on algorithms to price hundreds of thousands of rides each day in New York alone, Uber cannot operate under a rule that requires it to guess which rainstorms, which protests, or which bomb threats will be deemed in hindsight to have been severe enough to constitute “abnormal market conditions”—on pain of a civil penalty of \$25,000 per violation or three-times gross receipts, plus restitution, if Uber guesses wrong. When multiple events, only some of which are even arguably “abnormal,” occur in quick succession, it is simply not feasible to pinpoint the degree to which each of those events may be responsible for the supply/demand imbalance.

The rules, if enacted without addressing this flaw, will inflict one or both of two consequences—both untenable. First, Uber and other for-hire transportation providers may have to prophylactically limit their pricing in circumstances that do not genuinely constitute the type of “extraordinary adverse circumstances” that the Legislature intended to capture. With prices artificially suppressed, supply will not meet demand, and driver shortages will result. That will be bad for riders, who—for example—may be unable to find rides in the “severe rainstorms” that the rules vaguely suggest may trigger liability. It will be bad for the small businesspeople—drivers—who may take fewer rides at lower compensation, often in challenging conditions. And it will be bad for Uber, whose brand may suffer due to the dissatisfaction of riders and drivers alike.

Alternatively, Uber could decline to limit pricing and run the risk of the crushing and unduly punitive liability the statute threatens. But that result is not only unfair, and inconsistent with the bedrock principle that the law must be “sufficiently definite to provide a person of ordinary intelligence with fair notice of the conduct required and to prevent arbitrary enforcement,”⁴² but

⁴¹ See Philip Marcelo, *Police responding to bomb threat clear pro-Palestinian protesters occupying Barnard College library*, Assoc. Press (Mar. 5, 2025), <https://apnews.com/article/palestinian-protest-barnard-college-e16286f14d1265470c862b9f8b41c471>.

⁴² *Neuman v. City of New York*, 186 A.D.3d 1523, 1527 (2d Dep’t 2020).

also will only harm the New Yorkers who depend on Uber’s service. Facing the prospect of massive liability for guessing wrong under a hopelessly vague regulatory scheme, Uber may need to raise prices across the board to guard against this large but uncertain risk.

A better way is available. Sound regulation can avoid both risks by providing clear triggers that ensure that all stakeholders—riders, drivers, and for-hire transportation providers themselves—have clear notice of when New York is limiting dynamic pricing because it has deemed emergency conditions to exist. Uber has proposed before, and describes again below, an alternative that does just that by limiting dynamic pricing with a maximum of 3.0x surge multiplier during Governor-declared states of emergency. Although the proposed rule criticizes that alternative, Uber respectfully submits that those criticisms are misplaced, as detailed below.

C. The proposed rules’ pre-disruption price does not measure the prices at which for-hire transportation services were sold “in the usual course of business,” as the statute requires.

Under the proposed rules, the pre-disruption price is “the median price per [mile] taken from the set of all rides sold in the same hour of the day on the same day of the week as the scrutinized ride in the four weeks before the benchmark date,” within “20 miles of any point of the route of the scrutinized ride.”⁴³ But the reliance on a median is inconsistent with the statute. And by looking only at price per mile at a particular place and time, the proposed rules ignore a host of factors that shape Uber’s fares and therefore its “usual course of business.” Meanwhile, by sweeping in every ride within 20 miles of the route, the proposed rules compare very different rides—and Uber cannot even conduct in real time the comparisons that the proposed rules require.

Uber appreciates OAG’s invitation to provide “other factors that significantly weigh on for-hire ground transportation service pricing that would also be suitable for inclusion in the benchmark calculation” of the proposed rule’s pre-disruption price.⁴⁴ The proposed rule rightly recognizes that “a more tailored rule [is] appropriate”⁴⁵ given the complex factors that go into the pricing of for-hire transportation services that companies like Uber provide. Further, Uber commends OAG for the proposed rule’s recognition that any comparison between the pre-disruption price and the price of for-hire transportation services should be based on “the total amount charged” to a customer because non-completed offers do not capture relevant variables that may impact the actual rider fare (like wait times) – nor the reality that surge pricing acts as a demand suppressor when there is excess demand. As currently designed, however, the proposed pre-disruption price does not align with the “usual course of business”⁴⁶ of the for-hire transportation services industry and therefore does not lawfully implement the statute.

First, the proposed rules violate the statute by relying on a median price per mile. The statute deems prima facie unlawful a price that “presents a gross disparity between the [scrutinized] price ... and ... the price at which such goods or services *were sold* by the defendant in the usual course of business immediately prior to ...the abnormal disruption.”⁴⁷ If Uber sold a comparable

⁴³ NOPR at 6, 26.

⁴⁴ *Id.* at 30 n.101.

⁴⁵ *Id.* at 30.

⁴⁶ N.Y. Gen. Bus. Law § 396-r(3)(b)(i).

⁴⁷ N.Y. Gen. Bus. Law § 396-r(3)(b)(i) (emphasis added).

ride at a particular fare before the disruption, rides “were sold” at that price. And that remains true whether or not that fare was the median fare for similar rides or instead was the highest pre-disruption fare. Rather than measure fares in the “ordinary course,” a median comparator splits the ordinary marketplace in half, creating an artificial price ceiling tied only to the half representing the least expensive trips.

Second, the proposed rules violate the statute by failing to take into account a variety of factors that Uber’s fares incorporate in “the usual course of business.” The proposed rule asserts “that ride-hailing pricing depends primarily on day, time of day, and location.”⁴⁸ But as explained above, and reflected in Figure 5, Uber’s fares incorporate myriad other factors, and those other factors can substantially affect the fare per mile.⁴⁹ For ride-hailing companies like Uber, the “usual course of business”—defined in part in the proposed rules as the “methods or prices the seller employed or charged”⁵⁰—includes numerous additional factors to determine the price for for-hire transportation services including: trip duration and traffic conditions; rider preferences; regulatory policies; promotions; and demand fluctuations.

The proposed rule recognizes that the pickup and drop off location of a ride will impact fare price but ignores other variables at play. Traffic congestion, arising from any range of factors independent of the time and day a ride begins, can result in longer rides and thus higher fares. A ride using the same route on the same day may be vastly different from another ride weeks apart if a traffic accident or other commonplace cause of congestion results in a longer trip. Pricing methods based on both distance and duration are fundamental in New York’s ground transportation marketplace. For decades before the advent of ridesharing, taximeters have determined fares based on mileage *and time* spent on a ride. OAG’s failure to account for time in an industry-specific rule illustrates a significant misunderstanding of the “ordinary course” of the sector.

Uber appreciates the proposed rule’s recognition of the different types of ride services available and how their selection impacts fare pricing. Uber riders, for example, have significant choice in the type of service, ranging from higher-end black car service to eco-conscious “Uber Green” rides using hybrid and electric vehicles, and a rider’s service selection provides an important input into rider fare prices. The proposed rule, however, does not adequately account for other consumer preferences that also play a critical factor in determining fares. A rider in a hurry may choose to pay a higher price for a service with the shortest available wait time while another customer may pay a lower price for a ride with a longer wait time using the exact same route. Riders may also incur additional fees if their driver must travel a long distance to reach a rider, if the rider adds stops during a trip, if the rider has a preferred route that greatly deviates from the estimated route, or if the rider causes the driver to wait an extended time at the pickup location. Hence, rider preferences shape fares—but the proposed rules do not account for them.

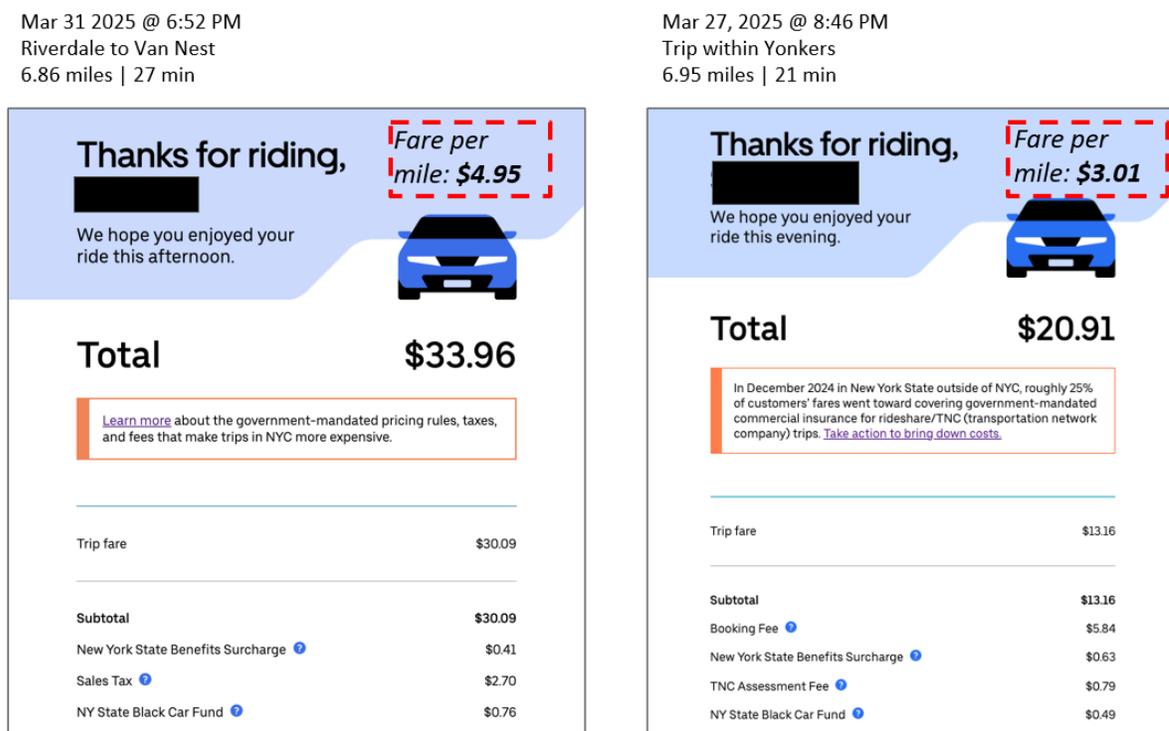
⁴⁸ NOPR at 26 & n.90.

⁴⁹ Although the proposed rule cited Uber’s website, that website in fact underscores that fares are about far more than day, time of day, and location: “Many data points go into calculating an upfront price, including the estimated trip time, distance from origin to destination, time of day, route, and demand patterns. It also includes tolls, taxes, surcharges, and fees (with the exception of wait time fees).” *How are Fares Calculated?*, Uber, <https://help.uber.com/riders/article/how-are-fares-calculated-/?nodeId=d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d> (last accessed Apr. 14, 2025).

⁵⁰ Proposed Rule 13 N.Y.C.R.R. § 600.1(p).

The proposed rules also ignore the numerous regulatory schemes that are at play for any given ride—schemes that shape price but that can vary across rides that the proposed rules treat as comparable. Uber fares include a benefits surcharge to cover minimum driver pay requirements enacted under New York state law. State law further requires that every fare contributes to the New York Black Car Operators’ Injury Compensation Fund. The New York State Assembly has also imposed a congestion surcharge on all Uber rides in Manhattan below 96th Street. Fares in New York City include not only these state law-related charges, but also an additional surcharge for rides by TLC-licensed vehicles that start, end, or pass through Manhattan below 60th Street. New York City drivers must also earn TLC-mandated pay rates that increase rider fares. Further, New York requires significant levels of commercial insurance coverage that can make up a large portion of a rider’s fare, including a \$1.25 million requirement for rideshare companies in New York when a passenger is in the vehicle.⁵¹ Hence, riders in New York City and those in other parts of New York State can pay drastically different prices for rides of the same distance. Indeed, different regulatory obligations in many cases can drive per-mile fares (as Figure 14 reflects) but the proposed rules ignore these differences.

Figure #14: How regulatory obligations can drive per-mile fares



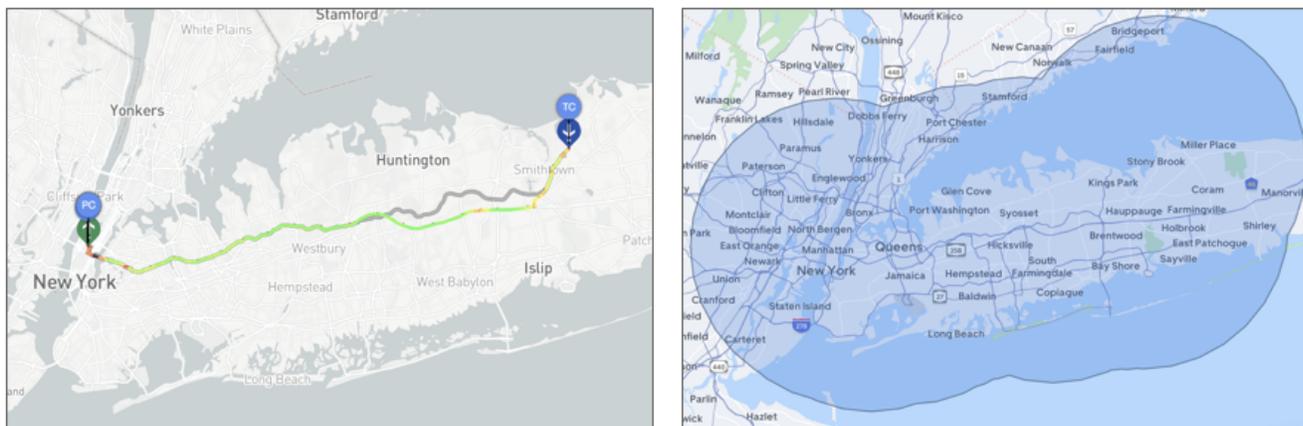
The proposed rules’ limited focus on service type, time, and location also does not adequately address demand fluctuations and the resulting price fluctuations—fluctuations that exist separate from “abnormal market conditions” or “seasonal events.” Drivers are independent, rational actors who have the choice of where, when, and whether to offer rideshare services to New York riders. Uber uses dynamic pricing to incentivize drivers to provide reliable service to all New York communities where there is demand, not only the most lucrative, like airports or high-income city

⁵¹ See N.Y. Veh. & Traf. Law § 1693.

centers. Accordingly, where there is adequate demand and supply of drivers, dynamic pricing generally plays a limited role in prices. Assume, for sake of argument, that this balance is thrown off in a more suburban or rural location because the multiple drivers who would normally serve the area recently stopped offering rides through Uber – instead opting to drive using a competitor’s app. Dynamic pricing would help ensure that Uber service remains accessible by raising fares and thus incentivizing other drivers to serve the area. The proposed rules would ignore that demand fluctuations in the ordinary course can be caused by any number of phenomena, and the proposed rules arbitrarily deem these normal fluctuations price gouging when they coincide with "abnormal" events that do not qualify as “seasonal events.”⁵²

Third, the proposed rules’ 20-mile radius is misguided because it forces apples-to-oranges comparisons and is impossible to implement in real time. Consider, for example, a hypothetical trip from lower Manhattan to Long Island. As Figure 15 highlights, a 20-mile radius extending from any point on such a trip would include Westchester, Nassau and Suffolk counties—markets with vastly different regulatory, tax, and driver pay regulations, as well as very different traffic patterns. The proposed rules, however, would treat all of those trips alike and penalize Uber for departures from the median of these arbitrarily identified comparators.

Figure #15: How the proposed rules’ 20-mile radius compares apples to oranges



Worse, this approach is impossible to implement. It is currently beyond Uber’s technical capabilities to create price controls that instantaneously calculate a fare along a rolling 20-mile radius of a hypothetical trip, let alone develop price controls that can respond to undefined “triggering events” over such an extensive geographic area. If the proposed rules are going to put Uber at risk of substantial civil penalties and disgorgement, Uber must be able to comply in real time. It cannot face this liability based on comparisons that can only be made after the fact.

D. The proposed rule will harm riders and drivers alike.

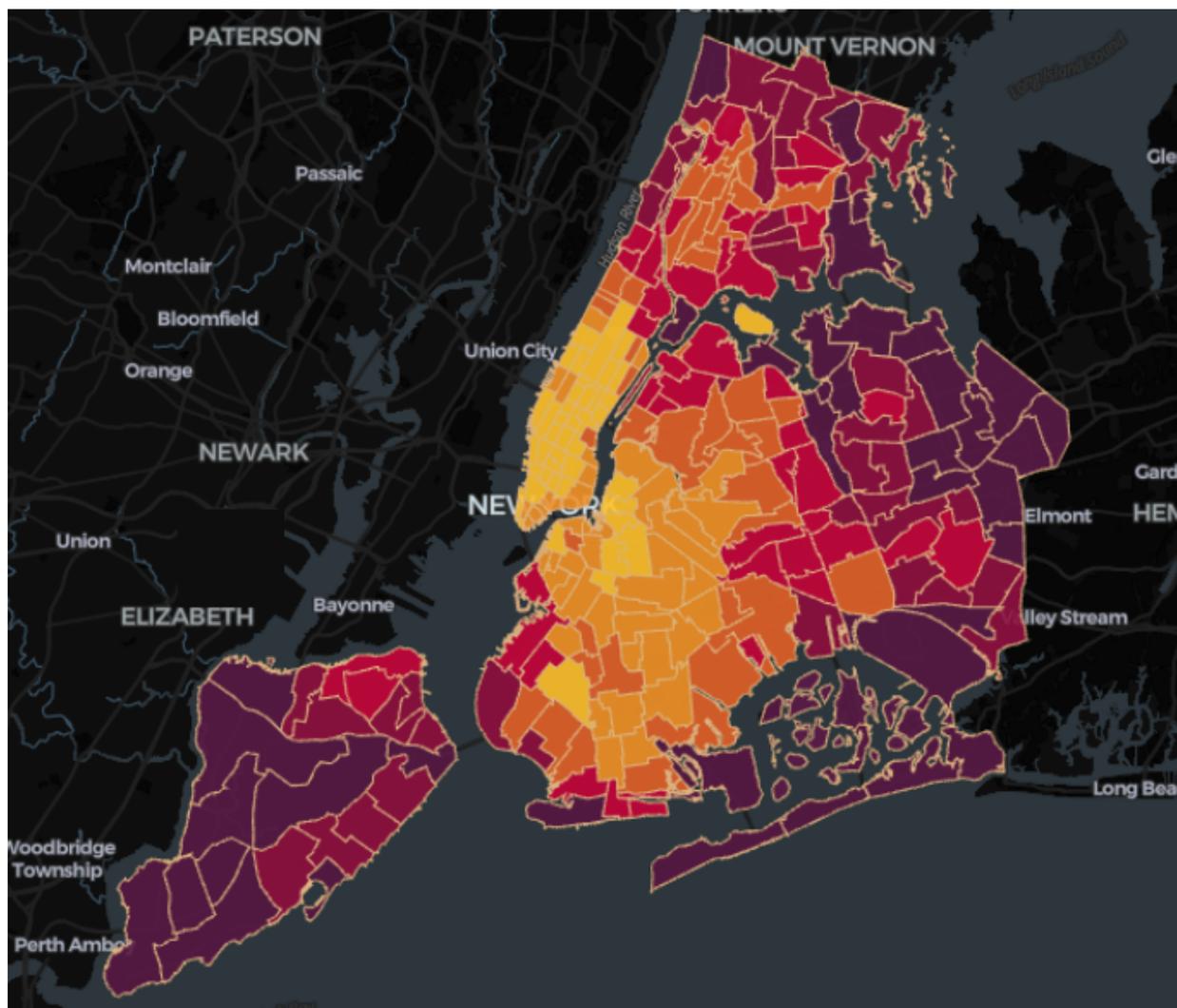
The proposed rules’ flaws—the 10% threshold that does not reflect industry realities, the vague definition of “abnormal disruption” lacking any clear or actionable trigger, and the pre-disruption

⁵² Proposed Rule 13 N.Y.C.R.R. § 600.5(c)(1)(i).

comparator that does not reflect Uber’s actual fares and that Uber cannot operationalize in real time—will together inflict significant harm on riders, drivers, and the public at large.

First, prices will increase. Absent workable guidance, rideshare companies like Uber will need to increase prices at all times to maintain a higher uniform rolling “median” fare-per-mile in hopes of reducing the risk of post-hoc enforcement actions. The figure below highlights the expected fare-per-mile increase for riders across New York City, with the darkest areas of the map representing the largest price increases.

Figure #16: Heatmap Projecting Areas of NYC Price Increases in Response to Proposed Rule 13 N.Y.C.R.R. § 600.5(c)(1)(i)



Second, driver earnings will decrease. Drivers depend on dynamic pricing, and Uber will have to reduce the use of dynamic pricing to limit the risk of arbitrary enforcement actions and civil penalties. Meanwhile, lack of surge will lead to marketplace volatility and fewer completed trips. And higher prices will lead to less rider demand—all to the detriment of drivers.

Third, reliability will suffer. Riders will face longer wait times and decreased reliability as drivers will no longer be incentivized by dynamic pricing to respond to increased demand.

The record does not reflect any adequate consideration of these factors by OAG. Without addressing the critical differences in the availability of ground transportation to urban, suburban, and rural Upstate New Yorkers, OAG claims “to all rural businesses this rule has no adverse impact.”⁵³ In reality, due to the local differences, the negative impacts of the proposed rule will be felt most deeply in suburban and rural communities, especially in Upstate New York. Drivers outside of New York City—who are independent contractors and small businesses in their own right—serve large geographical areas but typically have significantly lower fares with lower demand overall. The marketplace, however, must still sustain the minimum pay standard set by OAG.

Further, under TLC regulations, New York City drivers are professionally licensed, hold commercial insurance, and use commercially-registered vehicles.⁵⁴ Upstate drivers provide services in their personal vehicles.⁵⁵ Due to the regulatory barriers to entry, New York City drivers are overwhelmingly full time, and they cater to a 24/7 market for their services.⁵⁶ Upstate drivers are more seasonal and part time. Due to stark fluctuations in Upstate demand, servicing specific events—ski weekends, Bills games, summer events in Hudson Valley, college nightlife—is critical to sustaining their income.

Due to these Upstate fluctuations in rider demand, the most lucrative income opportunities for drivers in rural communities come from surge pricing, which drivers use to determine where and when they should drive with rideshare companies. In turn, upstate riders receive more reliable service in areas that would not be desirable absent surge pricing, as well as more consistently low fares during off-peak time periods. Without reliable ground transportation service, a myriad of Upstate businesses will suffer negative consequences. Uber specifically incentivises drivers to bring customers to and from small businesses and events Upstate.⁵⁷

II. A Better Way Exists—Regulating Surge Multipliers, Based On Clear Triggers.

A. The Only Fully Workable, Tested Alternative Is Regulating Surge Multipliers Using Clear Triggers.

A better approach exists—one that follows the path marked by New York itself in 2014, has been embraced by other jurisdictions, and builds on industry experience: regulating surge multipliers. In particular, the final rule should permit reasonable dynamic pricing with a maximum of 3.0x base fare multiplier⁵⁸ during Governor-declared states of emergency. The maximum base fare

⁵³ NOPR at 35.

⁵⁴ See generally 35 RCNY §§ 59A, 59D and 80.

⁵⁵ See N.Y. Veh. & Traf. Law § 1691.

⁵⁶ See City of New York, Off. of the Mayor, *For-Hire Vehicle Transportation Study* 3 (Jan. 2016), <https://www.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf> (noting rideshare “companies face added requirements under the TLC’s for-hire vehicle legal and regulatory framework” in New York City).

⁵⁷ For example, Uber runs promotions for drivers to pick up passengers from apple orchards in Warwick, Chester, and New Hampton; and to transport Bills fans trips to and from Highmark Stadium in Orchard Park.

⁵⁸ “Base fare” here means all fare components excluding the surge multiplier.

multiplier, or “surge cap,” would be restricted to the geographic region affected by the emergency (i.e., identified by the county within New York State); and the restriction would expire when the emergency is no longer influencing the marketplace. A 3.0x surge multiplier represents fares at which Uber rides “were sold ... in the usual course of business” before an abnormal disruption. N.Y. Gen. Bus. L. §396-r(3)(b)(i). In particular, during the first quarter of 2025 in New York state, 99.5% trip requests were at or below a 3.0x surge multiplier.

This alternative rule proposal maintains a practical standard that finds its origins in OAG’s prior policy. It maintains a standard that works to the benefit of driver earnings transparency. And it maintains a standard that benefits consumers, by supporting a reliable service when that service is needed most. Such a rule would also improve upon the proposed rule by providing the necessary consumer protections desired by OAG while permitting the industry to continue realizing the marketplace benefits provided by dynamic pricing. Moreover, by limiting the applicability to times of Governor-declared emergencies, the rule would provide the clarity and certainty that effective regulation requires.

Regulation of surge multipliers sets a clear framework that benefits government stakeholders, the industry, and New Yorkers. As OAG has previously put it, a surge cap “provides consumers with critical protections to which they are entitled under the law—and it provides Uber with clarity about how the law will be applied to its innovative pricing model.”⁵⁹ Tying the surge multiplier to a Governor-declared emergency, as rideshare industry-specific price gouging rules do across the U.S., allows for OAG to enforce New York’s price gouging law following an easily administrable methodology.

First, all stakeholders—OAG, rideshare companies, drivers, and riders—will act on a clear signal that an “abnormal disruption” is “actual or imminently threatened.” The Governor has access to the most up-to-date information through New York’s Office of Emergency Management, collaboration with federal emergency agencies, and communication with local emergency responders.

Second, once a declaration is issued by the Governor, OAG, like other rideshare regulators across the U.S., will know the time, place, and duration of an “abnormal disruption.” OAG can then evaluate all completed trips that were subject to the emergency declaration: those rides in a named area, during the emergency period, under the effect of the emergency conditions.⁶⁰ If any fare applied a surge multiplier of more than 3.0x to any of their fare components, OAG can find a presumptive violation. This easily administrable rule has an added consumer benefit. With a defined trigger, geography, and duration, rideshare companies can quickly make any affected consumers whole by refunding any impacted fares that included any excessive surge during the declared emergency.

⁵⁹ Press Release, Off. N.Y. Att’y Gen., *A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters* (July 8, 2014), <https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and>.

⁶⁰ Section 28 of Article 2-B of the Executive Law requires a governor’s emergency declaration to “include a description of the disaster, and the affected area.” N.Y. Exec. Law § 28(3).

This simple methodology preserves the benefits of dynamic pricing. Dynamic pricing works because it is closely tied to the level of the marketplace imbalance. The consumer benefit is well understood. In *The Effects of Uber's Surge Pricing: A Case Study*, Uber economist Jonathan Hall, University of Chicago Professor Chris Nosko, and Uber data scientist Cory Kendrick examined dynamic pricing's positive impact following a large concert from 2015, in contrast to a high demand period from the prior year's New Years Eve, where dynamic pricing failed to trigger.⁶¹ After the concert, drivers responded to Uber's dynamic pricing incentive and made their way to the concert venue, increasing overall reliability; where the dynamic pricing feature failed, riders' trip requests went unfulfilled, and drivers lost out on the increased earnings opportunities presented by the increase in demand.

OAG's proposed rules do away with the Attorney General's own prior policy and with it, the benefits to riders and drivers. The proposed rule lacks predictability, with no guidance as to normal versus abnormal demand increases. It does not establish prompt, official, and widespread notification that the broad anti-price gouging law is being activated. It establishes only presumptions and potential after the fact defenses. Indeed, the proposed rule risks bringing dynamic pricing, and the driver earnings that follow, to a grinding halt. Uber respectfully submits that the OAG can take a more carefully considered approach, as it has in its prior policy outlined in the 2014 agreement with Uber. To be clear: The new rules need not replicate that prior policy in every detail. Changes can reasonably be taken into account. The core framework of that policy, however, remains sound.

The proposed rule's criticisms of this alternative are misplaced. First, the claim that "a 10% disparity ... is a 'gross' disparity as an empirical matter"⁶² is wrong for reasons we have already explained: In this industry, 10% changes happen all the time in routine conditions. Second, the *Quality King* decision does not hold that "a 34% increase [i]s a 'gross disparity' as a matter of law."⁶³ That decision instead held, on the record before it, that particular price increases for Lysol products were gross disparities.⁶⁴

In its focus on a potential 300% increase in price, moreover, the proposed rule misses what this increase brings—more supply. The OAG Staff Report posits that in moments of abnormal disruption, businesses may not increase supply either because doing so is "physically impossible ... during the brief period of price spike" or because "it does not make business sense to expend what may be immense resources on supply expansion" when the disruption may be time-limited.⁶⁵ But as explained above, Uber's surge prices *do* boost and reposition supply. And they do so quickly, which may be especially important during emergencies. A choice to more narrowly restrict surge multipliers during emergencies is a choice to have *fewer rides*.

⁶¹ Jonathan Hall, Cory Kendrick, & Chris Nosko, *The Effects of Uber's Surge Pricing: A Case Study* (Sept. 2015), https://leeds-faculty.colorado.edu/leachj/BCOR1015/Readings%20not%20linked%20to%20Library%20Page/Effects_of_uber%27s_surge_pricing%20CASE.pdf.

⁶² NOPR at 29.

⁶³ *Id.*

⁶⁴ *People ex rel. James v. Quality King Distributions*, 209 A.D.3d 62, 80 (1st Dep't 2022).

⁶⁵ OAG Staff Report at 9.

Third, the proposed rule says that Uber has not identified the “base rate” to which the 3.0x cap would apply. That question is easily addressed: The base rate in this alternative proposal would be the components of the fare charged in the ordinary course of Uber’s business—inclusive of all of the fare components listed in Figure 5 above—and excepting only the surge multiplier applied to the fare. This same definition has been applied by regulators across the U.S.⁶⁶

That leaves only the concern with limiting the rule to Governor-declared states of emergency, when the statute arguably can reach emergencies beyond those the Governor has declared. But that concern neglects the structure of the statute as a whole. The General Assembly empowered the Attorney General to “promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section.”⁶⁷ As well, the Attorney General’s enforcement authority is discretionary, specifying that she “may apply” for judicial relief; because the statute authorizes, but does not require, the Attorney General to bring enforcement actions, the Attorney General can use the additional rulemaking power the General Assembly has conferred to recognize the importance of clear guidance in particular areas.⁶⁸ Finally, agencies are entitled to “decid[e] to proceed one step at a time in regulating a new (and rapidly growing and changing) form” of technology.⁶⁹ The Attorney General thus can, and should, decide that *right now*, the feasible way to regulate this new and rapidly evolving technology is via a clear trigger tied to Governor-declared states of emergency.

This one-step-at-a-time approach makes especially good sense because, so far as Uber can tell, it would not actually *exclude* any disaster that a court has found to constitute “abnormal market conditions.” The reported decisions Uber has identified have included hurricanes and winter storms that yielded state or federal declarations of emergencies, not things like severe rainstorms yielding no such declaration.⁷⁰ Moreover, Uber’s proposed approach is consistent with the OAG Staff Report’s recognition that the statutory phrase “abnormal disruptions” is “the New York law shorthand for natural and human disasters.”⁷¹

Uber stands ready to continue working with OAG to determine what other actionable triggers, besides a Governor-declared emergency, might be identified. But in the meantime, OAG should

⁶⁶ In a 2019 surge cap enforcement action, the Transportation Network Company Division of Massachusetts Department of Public Utilities defined “base fare” as the “standard components of the price of a Ride, not including a dynamic multiplier and/or other formula which increases the price of a Ride based on current, localized supply and demand.” See Travis Andersen & Adam Vaccaro, *Uber Used Surge Pricing During Storm last March, State Agency Rules*, Boston Globe (Jan. 18, 2019), <https://www.bostonglobe.com/metro/2019/01/18/uber-used-surge-pricing-during-mass-storm-last-year-state-agency-rules-cost-them/V52OBSYinxOxLd6lG6L8WK/story.html>.

⁶⁷ N.Y. Gen. Bus. Law § 396-r(5).

⁶⁸ *Id.* § 396-r(4).

⁶⁹ *Sullivan v. BDG Media, Inc.*, 71 Misc. 3d 863, 868 (Sup. Ct., N.Y. Cnty. 2021).

⁷⁰ *People ex rel. Abrams v. Two Wheel Corp.*, 71 N.Y.2d 693, 696 (1988) (Hurricane Gloria, declared emergency); *People ex rel. Vacco v. Chazy Hardware, Inc.*, 176 Misc. 2d 960, 963 (Sup. Ct., Clinton Cnty. 1998) (January 1998 ice storm, declared emergency); *People ex rel. Vacco v. Beach Boys Equip. Co.*, 273 A.D.2d 850, 851 (4th Dep’t 2000) (same); *People ex rel. Spitzer v. Dame*, 289 A.D.2d 997, 997 (4th Dep’t 2001) (September 1998 storm, declared emergency); *People ex rel. Spitzer v. Wever Petroleum, Inc.*, 14 Misc. 3d 491, 494 (Sup. Ct., Albany Cnty. 2006) (Hurricane Katrina, declared emergency); *People ex rel. Spitzer v. My Serv. Ctr., Inc.*, 14 Misc. 3d 1217(A), 836 N.Y.S.2d 487 (Sup. Ct., Westchester Cnty. 2007) (unpublished table decision) (same); *Quality King Distrib.*, 209 A.D.3d at 79-80 (COVID-19 pandemic, declared emergency).

⁷¹ OAG Staff Report at 6.

seize the opportunity this rulemaking presents by proceeding one step at time, rather than endangering the project with an unworkably vague trigger.

In all events, to ensure fairness and operational efficiency, it is crucial that regulated entities with dynamic pricing are afforded sufficient time to adjust their pricing strategies in response to “abnormal disruption[s] of the market.” Moreover, they should have the opportunity to refund fares during conditions that are later determined to constitute “abnormal disruption[s]” without incurring liability for civil penalties. When regulated entities have timely provided such remediation, the rules should make clear that the fares they ultimately charged did not constitute “gross disparities” within the meaning of the statute. This approach not only supports compliance but also safeguards the integrity of their operations during periods of abnormal market behavior.

B. Although Still Problematic, Uber Has Endeavored To Improve Upon The Post-Hoc Approach Of The Proposed Rules.

Based on the company’s experience responding to emergencies in New York and other jurisdictions with similar price gouging laws, Uber continues to believe that regulating surge multipliers is by far the most effective and administrable approach. But should OAG decide to consider alternative approaches involving post-hoc tests, it can at minimum attempt to address the most significant problems with the current proposed rules. Any alternative must at least address the three problems described above by: (1) identifying clear triggering events; (2) analyzing “scrutinized” rides with a more comparable basket of pre-disruption rides; and (3) measuring “gross disparities” in a manner that reflects industry realities and the statutory text. Uber below describes a possible approach that would at least improve upon the proposed rules—though it is likely to produce false positives and remains problematic in many of the same important respects of the proposed rules discussed above.

The test outlined below attempts to allow for some level of surge (i.e., a 3.0x surge multiplier) to incentivize drivers to provide reliable service and access to transportation, as detailed above, while addressing OAG’s previously shared concern of identifying increases to the “base” that is being multiplied. To that effect, the methodology proposed relies on two components: (i) an analysis for the non-surge component of the fare of the “scrutinized ride” that determines if its level is consistent with what is observed during Uber’s “usual course of business,” and (ii) a methodology to confirm that the surge multiplier used on the “scrutinized” ride is in compliance with the maximum level allowed during an emergency. The test below assumes that OAG has provided clear and administrable guidance on triggering events, such as those tied to Governor-declared states of emergency.

Non-Surge Component

- (1) In determining the fare for the “scrutinized” ride and the basket of pre-disruption comparator rides, remove all components that are outside of Uber’s direct control, and which may cause the fares with similar time and distance to vary, by evaluating the total fare excluding taxes, fees, tolls, Booking Fees, and any regulatory costs that are passed on directly to the rider (identifying an “evaluation fare”), as well as costs such wait time, which are rider choices and can distort comparisons.

- (2) To determine the non-surge component of the evaluation fare, remove the dollar amount of surge from the “scrutinized” ride and from all trips in the comparison basket. This amount will be referred to as “non-surge fare” in the test.⁷²
- (3) Identify a basket of pre-disruption rides that are as comparable as possible to the “scrutinized” ride, including by:
 - (a) Limiting the pre-disruption comparators to trips with a start location within a 1-mile radius from the pickup location of the “scrutinized” ride.
 - (b) Limiting the pre-disruption comparators to trips on the same day of the week and within 1-hour from the pickup time of the “scrutinized” ride.
 - (c) Limiting the pre-disruption comparators to trips with values of time and distance within 15% of the “scrutinized” ride (each component must be +/- 15%).
 - (d) Limiting to trips of the same product offering (UberX, Uber Black, Uber Black SUV, etc.) or “type of service” as defined in Proposed Rule 600.5(a)(5).
 - (e) Limiting comparator trips to the same jurisdictional requirements for driver pay.
 - (f) Excluding comparator trips from calculation if such comparator trips are impacted by one or more “seasonal events” as defined in Proposed Rule 600.5(a)(4).
- (4) Measure “scrutinized” trip against baskets of pre-disruption trips in terms of both price per mile and price per minute, to account for the distortions produced by short trips (in terms of both time and distance) and unusual traffic.

Surge Component

- (5) Determine the surge multiplier that applied to the “scrutinized” ride.

Test Application: OAG could find a “gross disparity” if either of the following conditions are met: (i) The surge multiplier on a trip exceeds 3x, or (ii) the evaluation of the non-surge fare per minute and the evaluation of the non-surge fare per mile are **both** higher than 2.5x the median of the comparison group (calculated in the manner described in subparagraph 3 above).

This test is compatible with OAG allowing a certain level of surge, while ensuring that the base upon which it is multiplied remains within the range of what is charged during Uber’s usual course of business. Again, this alternative would require defining “abnormal market condition” as a Governor-declared state of emergency or other comparably clear and administrable trigger (and again would be subject to companies’ ability to remediate, as described above). Despite Uber’s significant remaining concerns with this alternative, it would be a substantial improvement over the proposed rules. Given that states of emergency can be issued to start immediately, and may begin once a marketplace has already been disrupted, companies should have the ability to

⁷² Because “scrutinized” rides will often have higher levels of surge than rides unaffected by “abnormal disruptions,” removing the surge component from the fare allows for a more “apples to apples” comparison of what Uber charges for the “scrutinized” ride relative to a comparable group of rides.

remediate fares after the fact. As such, for any trips over 3x surge, this alternative would exclude from the calculation any portion of the fare at over 3x surge if that amount has been refunded to bring the fare to at or below 3x surge.

As explained above, the proposed rules' reliance on departures from medians is inconsistent with the statute, which asks whether services "were sold" at a price pre-disruption. For this reason, Uber cannot endorse reliance on a median-based metric. This alternative aims to avoid some of the other problems with the proposed rules' approach, within the context of a median-based metric.

To be clear, Uber would also have additional, significant concerns with this alternative, because Uber cannot do the analysis required in real time.⁷³ *A complex, multi-step, after-the-fact methodology is particularly bad policy for emergency situations.* Sound regulation should enable parties to conform their conduct to the law, rather than forcing them to guess when liability might or might not be imposed.

Conclusion

Uber continues to support OAG's stated goal to provide clearer guidance to companies and better protections for consumers. In order to do so, it is imperative to address the serious concerns detailed above before adopting the proposed rules. Uber stands ready to continue to engage with OAG to achieve their shared goals of ensuring reliable and affordable transportation for all New Yorkers, in emergencies and in the ordinary course.

Respectfully,



Diego Diaz
Senior Counsel, U.S. Regulatory
Uber Technologies, Inc.

⁷³ In addition, given the many components that go into determining the price of a trip, there is a large amount of variation in pricing for very similar trips. This creates a "distribution" of prices for trips that are similar in terms of time and distance that cannot be described by one summary statistic (for example, a median or an average). Thus, any test that relies on one such summary statistic will falsely classify certain trips as disparities.

EXHIBIT A

BEFORE THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

**In response to:
Notice of Proposed Rulemaking Pursuant to
N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)**

Submitted: May 22, 2023

**COMMENTS OF
UBER TECHNOLOGIES, INC.¹**

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Uber submits this correspondence in response to the Office of the New York State Attorney General’s (“OAG” or the “Attorney General”) request for public comment. These comments concern the Attorney General’s proposed rules aimed at reducing the risks of price gouging in times of emergency and “abnormal market disruptions” (“proposed rules”). Uber appreciates the opportunity to submit this correspondence and respectfully requests continued engagement with OAG on these very important matters.

Introduction

New York residents depend on the reliability of the Uber platform. When traditional transportation options incur disruptions, New York drivers use the Uber platform to fill the void. Those drivers play a critical role in providing mobility to those New Yorkers that are most affected by abnormal disruptions—rural and low-income communities, and those New Yorkers underserved by existing transportation infrastructure.

Since 2014, when emergencies have struck communities across New York, Uber has deployed a framework that has kept prices low, ensured that drivers are appropriately compensated, and maintained reliability during emergency demand. Uber supports the OAG’s effort to enhance the current price gouging protections enjoyed by the people of New York. The proposed rules,

¹ “Uber” or “the Company” herein refers to Uber Technologies, Inc. and its affiliates including but not limited to Uber USA, LLC, and Rasier-NY, LLC. Uber USA, LLC is a licensed High-Volume For-Hire Service as defined in New York City Administrative Code § 19-502. Rasier-NY, LLC is a licensed Transportation Network Company as defined in Vehicle and Traffic Law § 1691

however, would upend the very reliability that New Yorkers have come to expect and deserve from the Uber platform.

As set forth more fully below, Uber believes: (1) dynamic pricing regulation should come from the legislature; (2) OAG should further engage with New York's TNC and for-hire vehicle industries (the "ride hailing industry" or the "Industry"), specifically, before carrying out proposed rules; (3) in the absence of legislative action, and following further Industry engagement, propose a rule specific to dynamic pricing by Industry companies; and (4) restrict the Industry's use of dynamic pricing only during states of emergency declared by the Governor's Office.

Background of Pricing on the Uber App

Uber offers upfront pricing to each rider who uses the Uber platform to request a trip. This means that a rider will see, via the Uber App, the price that will be charged before that rider requests the trip. Upfront prices are based on a variety of data points, including the estimated time and distance from origin to destination, localized real-time supply and demand patterns, and other marketplace factors. The upfront price will also include expected tolls, taxes, surcharges, and fees.

Dynamic pricing is a feature that involves adjusting the pricing of goods or services in real-time, based on supply and demand in a specific location/market. In the context of services offered by companies like Uber, dynamic pricing allows for the efficient allocation of resources. By adjusting prices in real-time, it helps to ensure that supply and demand are matched at all times. For example, if there is a surge in trip requests (demand) during rush hour, dynamic pricing can encourage additional drivers to go online, which increases supply and permits prices to naturally decrease. Conversely, dynamic pricing can be used to incentivize drivers to stay online in times of relatively low rider demand, ensuring that there is sufficient supply available when rider demand increases. When prices are higher due to increased demand, the Uber App will display a message within the App notifying riders that prices are higher than usual.

Uber manages dynamic pricing through detecting real-time shifts in rider demand and driver availability across geographic areas. Uber uses surge pricing to incentivize drivers with higher potential earnings during high demand and disincentivizes riders by charging a premium in times of low driver supply. In the same way riders are notified of higher prices, drivers receive notifications of increased demand, allowing drivers to identify nearby areas with higher demand.

Dynamic Pricing Regulation in the US

Complex marketplaces must be subject to clear and effective regulation, to ensure they operate fairly and efficiently. In this regard, legislative action is preferable to agency rulemaking. Legislative action allows for a comprehensive and transparent approach to regulation, ensuring that all stakeholders are given a voice and that the rules are clear and enforceable. Legislative bodies have consistently acknowledged the importance of setting specific dynamic pricing criteria for Transportation Network Companies to use in times of declared emergencies. Connecticut, Massachusetts, Pennsylvania, Washington, D.C, Washington state, Rhode Island,

Nevada, and Nebraska all maintain rules to address dynamic pricing within Industry marketplaces.²

In the state of Connecticut, a model identified by OAG within the proposed rules, imposes a limit of a 2.5x multiplier on dynamic pricing—during times of emergency as declared by the Governor.³ Uber does not disagree that reasonable regulation in times of specifically declared emergencies can protect consumers from profiteering. The nuance and importance of dynamic pricing, however, should be addressed by the legislature, as in many other states, or specific, narrowly-tailored regulation such as OAG’s prior agreement with the Company. In the agreement, Uber agreed that it would not raise prices higher than the fourth-highest price charged in the same city and surrounding area in the sixty days preceding the abnormal market disruption. The agreement expired in 2017, but continues to guide Uber’s operations today.

Should OAG desire to act in the absence of dynamic pricing-specific legislation, Uber submits, for the reasons discussed below, that a rule specific to the ride hailing industry should be proposed. Such a rule should avoid both the confusion and marketplace disruptions that are likely to result from OAG’s current proposals.

Industry-Specific Rule and 2014 Agreement

In its mandate to commence rulemaking, the New York legislature expressed valid concerns about the potential for price gouging and unfair practices. Yet the technical matters, specific to Uber’s marketplace and that of other Industry participants, can and should be addressed through targeted regulations that ensure transparency and fairness in pricing. Uber commends OAG in its recognition that ride hailing marketplaces serve a particularly vital societal function that, especially in times of emergency, promotes public policy. The Industry’s use of dynamic pricing promotes efficient allocation of resources, ensures quality service, and creates market efficiencies. It is important that regulations continue to allow for dynamic pricing within the ride hailing industry, so that consumers may continue to benefit from these advantages.

Since 2014, when emergencies have struck communities across New York State, Uber has deployed a framework that has kept prices low, ensured that drivers are compensated, and maintained reliability during abnormally disruptive rider demand. As noted in the Attorney General’s proposed rules, Uber and the OAG previously agreed to a formula in support of this framework. While that agreement has expired, Uber continued to follow the requirements, recognizing that the framework struck the appropriate balance between price fairness, transparency and marketplace health for both drivers and riders.

Uber believes that the prior agreement remains fit for purpose. The market realities of New York’s Transportation Network Company services, and services provided by For-Hire Vehicles, establish prices based on real time market conditions. Therefore, Uber has long supported and employed price transparency to its many customers. The use of pre-trip estimates and binding

² See CT Gen. Stat. 13b-118(b)(4)(C); MA Gen L ch 159a1/2 § 2(e); 66 PA Cons Stat § 2607(e); DC Code § 50-301.31(b)(13); Wash. Rev. Code § 46.72B.050(2); RI Gen L § 39-14.2-3(b); NV Admin Code 706A.290(2); and NE Code § 75-327(2)(iv)

³ CT Gen. Stat. 13b-118(b)(4)(C)

upfront prices provides consumers with the necessary information before opting to request a trip. Moreover, Uber maintains a public website explaining the inputs of its pricing model, including the use of dynamic price multipliers. These policies were in place at the time of Uber's 2014 agreement with OAG, and they remain in place today.

Proposal: Alternative Dynamic Pricing Rule for Industry

Uber appreciates the Attorney General's openness to alternative rule proposals. Given the Company's experience and prior engagement with OAG on this matter, Uber urges OAG to propose a rule that continues with the framework established by the 2014 agreement: permitting reasonable dynamic pricing with a maximum of 3.0x base fare multiplier, during Governor-declared States of Emergency; the maximum, or "cap," would be restricted to the geographic region affected by the emergency (i.e., identified by the county within New York State); and the restriction would expire when the emergency is no longer influencing the marketplace. Such a rule would improve upon proposed Rule 7, providing the necessary consumer protections desired by OAG while permitting the Industry to continue realizing the marketplace health benefits provided by dynamic pricing. Further, by limiting the applicability to times of gubernatorial declared emergencies, companies using dynamic pricing would not need to make guesses about the "abnormal" nature of a specific market event.

Uber's alternative rule proposal provides clearer guidance to Industry. Rather than lead to "too much condoned profiteering," as suggested in the discussion to OAG's proposed Rule 7, Uber's alternative rule proposal maintains a practical, flexible standard that finds its origins in OAG's prior policy. It maintains a standard that works to the benefit of driver earnings transparency. And it maintains a standard that benefits consumers, by supporting a reliable service when that service is needed most.

Dynamic pricing works because it's closely tied to the level of the marketplace imbalance. The consumer benefit is well understood. In *The Effects of Uber's Surge Pricing: A Case Study*, economists Jonathan Hall and Chris Nosko and data scientist Cory Kendrick, examined dynamic pricing's positive impact following a large concert from 2015, in contrast to a high demand period from the prior year's New Years Eve—where dynamic pricing failed to trigger.⁴ After the concert, drivers responded to Uber's dynamic pricing incentive and made their way to the concert venue, increasing overall reliability; where the dynamic pricing feature failed, riders' trip requests went unfulfilled, and drivers lost out on the increased earnings opportunities presented by the increase in demand.

The Attorney General's proposed Rule 7 does away with its prior policy and with it, the benefits to riders and drivers. The proposed rule lacks predictability, with no guidance as to normal versus abnormal demand increases, even though the public benefits from distinguishing public gatherings from officially declared states of emergency. It does not establish prompt, official, and widespread notification that the broad anti-price gouging law is being activated. It establishes

⁴ *The Effects of Uber's Surge Pricing: A Case Study*, Jonathan Hall, Cory Kendrick, and Chris Nosko, https://leeds-faculty.colorado.edu/leachj/BCOR1015/Readings%20not%20linked%20to%20Library%20Page/Effects_of_uber%27s_surge_pricing%20CASE.pdf

only presumptions and after the fact defenses. Indeed, the proposed rule appears aimed at bringing dynamic pricing, and the concomitant driver earnings, to a grinding halt. Uber respectfully submits that the OAG can take a more carefully considered approach, as it has in its prior policy outlined in the 2014 agreement with Uber.

Discussion: Office of the Attorney General Proposed Rules

Uber reiterates its request for further engagement with OAG, regarding dynamic pricing rules specific to the ride hailing industry. Nonetheless, the Company wishes to highlight a few concerns with certain of the remaining proposed rules. Uber respectfully urges OAG to consider these comments carefully as it continues with administrative proceedings.

Rule 1: Presumption of gross disparity

The Attorney General’s proposal for the presumptive case of gross disparity does not squarely apply to Uber’s business. Were Uber to be subject to such a rule, the Company, and others using dynamic pricing discussed in proposed Rule 7, would not have the proper guideposts of behavior to conduct business. The “usual course of business immediately prior to the onset of the abnormal disruption of the market” is not easily found when dynamic pricing is part of the ordinary course of business and responsive to marketplace factors at issue even without a state of emergency. Moreover, the proposed rules do not provide any clear guidance for when, exactly, an abnormal disruption has occurred. The proposed rule’s two examples—power grid malfunction and heavy snowstorm—demonstrate the importance of referencing Governor-declared states of emergency. Otherwise, companies using dynamic pricing will be left guessing as to which price will set the rule’s 10% standard. As a result, drivers using New York’s ride hailing platforms will not receive a clear signal about where their services are needed and whether it will benefit them to respond to increasing demand for rides.

The reasons provided for creating the proposed rule’s presumption demonstrate that rule’s awkward fit with Uber’s business. Reason number one cites a similarity to other states in the US. Yet no other state applies such a presumption to dynamic pricing. Indeed, as discussed above, other state legislatures tend to apply special rules to Industry dynamic pricing—similar to standards observed in OAG’s prior agreement governing Uber’s operations during states of emergency. The “societal convergence,” then, is what animates Uber’s alternative rule proposals. Contrary to reason number two, the proposed Rule 1 is not easily administrable for Industry companies using dynamic pricing. Such Industry pricing policies are in furtherance of marketplace health. In the ordinary course, Uber’s operations are on the lookout for disruptions, communicating to drivers where the services are most in-demand. The drivers expect to receive price signals and they themselves address the disruptions. The proposed rule, however, introduces both uncertainty and limitations on drivers’ ability to receive that key information.

The third reason for the presumption explicitly contemplates retail operations. Numerical guidance *may* in fact benefit small retailers, one of the rule’s stated benefits. But this third reason *certainly* demonstrates that the rule does not squarely apply to platform operations using dynamic pricing. Finally, the fourth reason for the proposed rule highlights “vital and necessary

goods” offered at retail. Uber operations’ use of dynamic pricing works to provide, rather than withhold, a service that is often vital during states of emergency. Thus, Uber’s alternative rule proposal does not promote unconscionable conduct. Rather, it aims to strike the same fundamental balance of supply and demand interests that gave rise to the Company’s 2014 agreement with OAG—to promote a reliable service during states of emergency.

Rule 2: Costs not within the control of the Company

In New York State, and across the US, riders using the Uber platform are shown the cost of their ride in advance. Before booking a trip, riders are shown the price they’ll pay at the end of the ride. Riders then have the confidence to request more trips, generating more demand for drivers. Many data points go into calculating an upfront price, including the estimated trip time and distance from origin to destination, as well as demand patterns for that route at that time. It also includes any applicable tolls, taxes, surcharges, and fees (with the exception of wait time fees). Uber comments here to note that dynamic price increases are directly attributable to the production, purchase, storage, distribution, taxation, labor, and sale of the services available on the Uber platform. The dynamic pricing feature for drivers using the Uber platform is a relief valve for the ride hailing marketplace. Without it, when demand for rides exceeds the number of available drivers, riders will wait longer or might not be able to get a ride at all. Drivers will also have less incentive to accept requests in busy areas. An imbalance between supply and demand is not within Uber’s control – when demand exceeds supply prices, increases to prices attract more drivers to restore balance to the marketplace.

The Attorney General’s discussion of proposed Rule 2 demonstrates the difficulty of its application to services available on the Uber platform. Uber’s use of dynamic pricing is specific to demand for the services and is hyper-local to the marketplace health. The use of external indices or particular accounting practices is not a consideration. By definition, dynamic price increases are responsive to the state of emergency or abnormal market disruption. Uber commends OAG’s efforts to provide clear guidance for industry on a key affirmative defense in the statute. The proposed rule, however, does not fit within the operations of TNC and for-hire vehicle services. Thus, Uber respectfully requests that, as discussed in proposed Rule 7, OAG consider an alternative rule intended for dynamic pricing on the Uber platform.

Rule 3: Pricing of products introduced after the market disruption

Uber applauds OAG’s efforts to address pervasive economic disruptions related to the COVID-19 pandemic and consumer demand. The challenges have had a significant effect on many industries. Proposed Rule 3 appears aimed at the sale of goods introduced in response to major disruptions, providing more clarity where it is needed. Uber submits, however, that the proposed rule is limited in its application to services available on the Uber platform. The proposed rule therefore provides support for the continued use of standards found in Uber’s alternative rule proposal. Those standards are borne out of the Company’s 2014 agreement with OAG, and found broad application during the COVID-19 State of Emergency.

Additionally, Uber has reservations about the proposed rule’s use of higher-percentage profit margins as evidence of unconscionability. Such an approach will chill the efforts of those who

create new products in response to the disruption. Moreover, the proposed rule provides no guidance on what constitutes a “comparable product” when a markedly improved good or service is brought to market. In response to the COVID-19 pandemic, many drivers and other workers using the Uber platform provided services that they had not provided before. Many of those workers provided services *better* than the provision of the same services before. That work is to be applauded and recognized as an improvement. A reference to prior iterations likely would not be appropriate. Any new legal standards found in, and investigations related to, these proposed rules should clearly differentiate between price gouging and price increases related to innovation, creativity, and general improvements in human capacity. Uber is supportive of evidentiary standards that are grounded in specific economic analysis. But section two of proposed Rule 3 introduces the risk of standards that profoundly limit advancement.

Rules 4-5: The use of unfair leverage

The Uber platform strives to create seamless experiences all over the world. The Company strives for a balanced and reliable marketplace, taking up the responsibility to align the different and sometimes conflicting needs of riders and drivers. The work is challenging, technical, always in progress, and often humbling. Few companies have even tried it.

Uber wants to ensure that the Attorney General’s office takes these fundamental matters into consideration when establishing unfair leverage based on market concentration. Uber submits that its operations do not contain the practices noted in proposed Rule 4, or in the authorities cited, giving rise to “unfair leverage or unconscionable means.” Nonetheless, the presumptions established in proposed Rule 5 are concerning. While Uber submits that dynamic price increases are cost-based, the broad presumptions in the proposed rules, relating to market share and concentration, serve to upend an open marketplace that is responsible for over 500,000 daily trips in New York City.

The novelty and technical complexity of the ride hailing industry lend themselves to market concentration. In New York City, Uber is one of only two High Volume For-Hire Service companies – a category created only after Uber had been established in the city. Other such companies have left the market due to inherent operational challenges. Yet the Uber platform uses dynamic pricing to ensure a reliable and open marketplace for mobility and work. Contrary to the assertions stated in the proposed rule discussion, dynamic pricing during abnormal market disruptions is not the result of available merchandise stock or preferential treatment from suppliers. Rather it provides a signal to workers about earnings potential, thereby seeking to ameliorate market disruptions.

The workers who use the Uber platform have the ability to choose where and when they want to work. In an open marketplace, driver earnings are largely a function of rider demand. Earnings potential is highest when and where it is busy – and sometimes during a State of Emergency. Uber’s technology helps workers make choices about where and when to find demand, using Uber’s Driver app. When drivers are on the road and between trips, they get real-time updates about demand and dynamic pricing.

Uber respectfully requests that, as acknowledged in the discussion to proposed Rule 7, OAG consider an alternative rule intended for dynamic pricing on the Uber platform. Otherwise, the standards announced in proposed Rule 5 would unfairly and inappropriately apply to services on the Uber platform—services that use dynamic pricing to *create* the supply where it is most needed, especially during States of Emergency.

Conclusion

In summary, Uber is committed to adhering to the pricing restraints under GBL Section 396-r(5), whenever it is activated by an abnormal market disruption. However, in order to strike the appropriate balance among New Yorkers who use the Uber platform for earnings and for services, and in order to promote general commercial compliance across New York State, the rules need to be amended to allow for rules specific to dynamic pricing in the ride hailing industry, and to allow for both stability and innovation in response to abnormal market disruptions.

Thank you for the opportunity to comment.

Respectfully,

A handwritten signature in blue ink, appearing to read "R. Burch", with a stylized flourish at the end.

R. Jason Burch
Legal Director, US Regulatory

EXHIBIT B

The Driver Pay charts display the median gross pay (before expenses and taxes) for the sectors for which TLC collects driver pay data. Tips are not included in the driver pay amounts but are shown separately when hovering over the chart. Full-time and part-time definitions are provided in the notes.

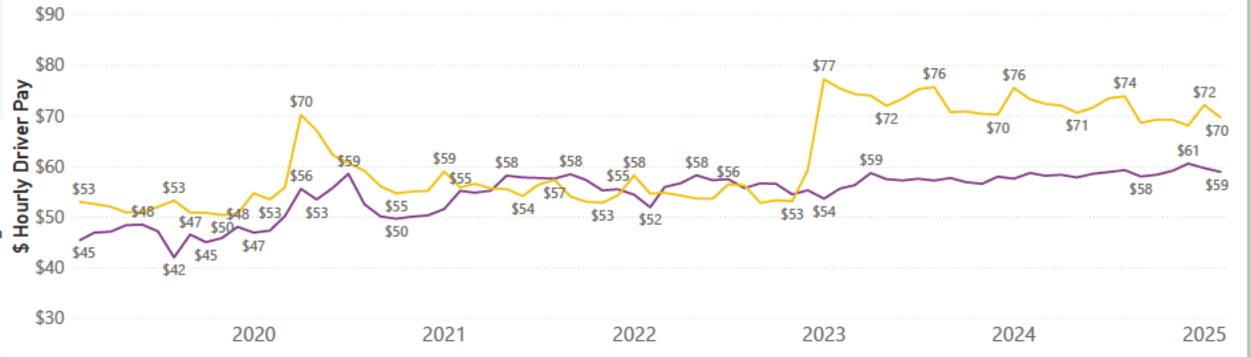
1/1/2019 2/1/2025

- Driver Type
- All Drivers
 - Full-Time
 - Part-Time

Annual Monthly **Hourly**

Hourly Driver Pay By Number of Trip Hour

Industry ● FHV - High Volume ● Yellow Taxi



***Notes:**
For Monthly and Hourly Driver Pay, full-time drivers are those who worked an average of 32 or more hours per week in a given month. In recent years, approximately 70-75% of Yellow Taxi drivers and 55-60% of FHV - High Volume drivers worked full time each month

Summary of Meetings with Stakeholders

Two meetings with representatives of stakeholders were held during the comment period, both with Uber Technologies, Inc.

The first was a preparatory meeting on Friday, March 28, 2025, in which Uber inquired as to the extent to which non-public information could be presented during the public comment process; OAG advised Uber that no such information could be submitted or relied upon and any materials Uber submitted to OAG would be published. No substantive matters were discussed at this meeting.

A second, substantive meeting was held with representatives from Uber (Diego Diaz, Rachel Perl, Nick Davoli, Chad Dobbs) and OAG (Chris D'Angelo, Alec Webley) on April 2, 2025, in which Uber presented the slides that follow.

In addition to describing the above slides, Uber representatives answered questions from OAG staff regarding how Uber's "normal" or "base" fares were computed, the relationship between the amounts paid to drivers and the amounts consumers are charged and adjusted, how Uber's profit margin can be calculated per mile, and other States' regulatory approaches to ride-hailing price gouging.

OAG requested Uber present in its written comment its view of public data concerning the variability of prices charged for rides solely within Manhattan, holding time of ride and length of ride constant. OAG further requested Uber provide comment on how Uber's proposals might be framed to fairly and consistently encompass ground transportation service providers that do not follow Uber's tripartite "base plus regulatory plus surge" pricing model.

Proposed Rules on New York's Price Gouging Law

April 2, 2025

Agenda

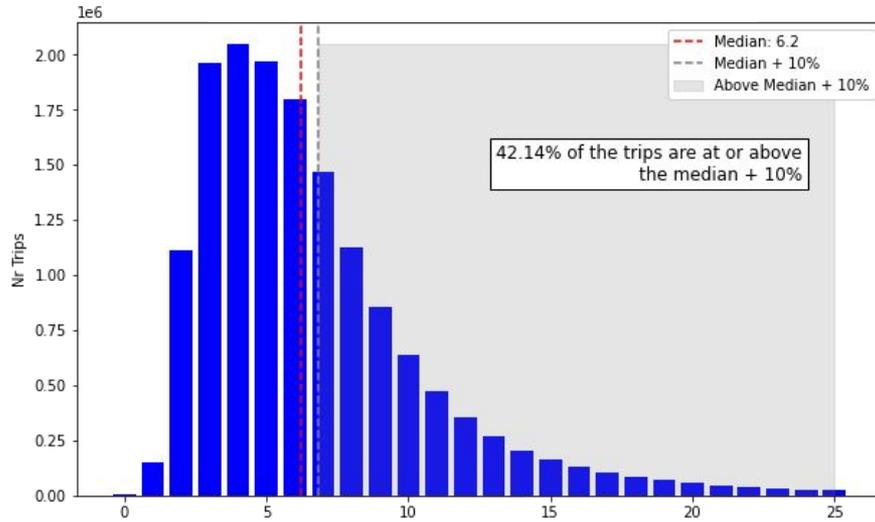
1. 10%+ Fluctuations are the Usual Course for Ground Transportation; Fares reflect Informed Consumer Choices in a Heavily-Regulated Marketplace
2. In Real Time, Algorithmic Multipliers Address Marketplace Disruptions
3. To Protect Public Safety, Proposed Rules Must Provide Guidance, Be Actionable, and Be Supported by Industry Experience

Ground Transportation Marketplace:

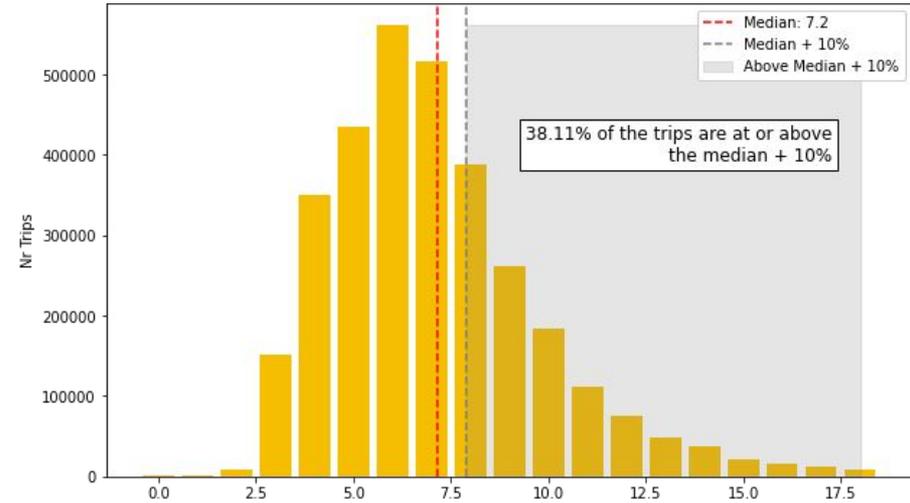
Fare Variation, Fare Components, & Rider Disclosures

“General Rule”: 40% of Ground Transportation Fares Constitute “Price Gouging”

“The Attorney General considered [**a 3.0 surge cap**] but rejected it on the grounds that it was inconsistent with the statutory text in several ways... first, a **10% disparity in price is a ‘gross’ disparity’ as an empirical matter.**” - 600.5, pg. 29. (citing OAG Staff Report)



Histogram of Uber Fare per mile
January 2025

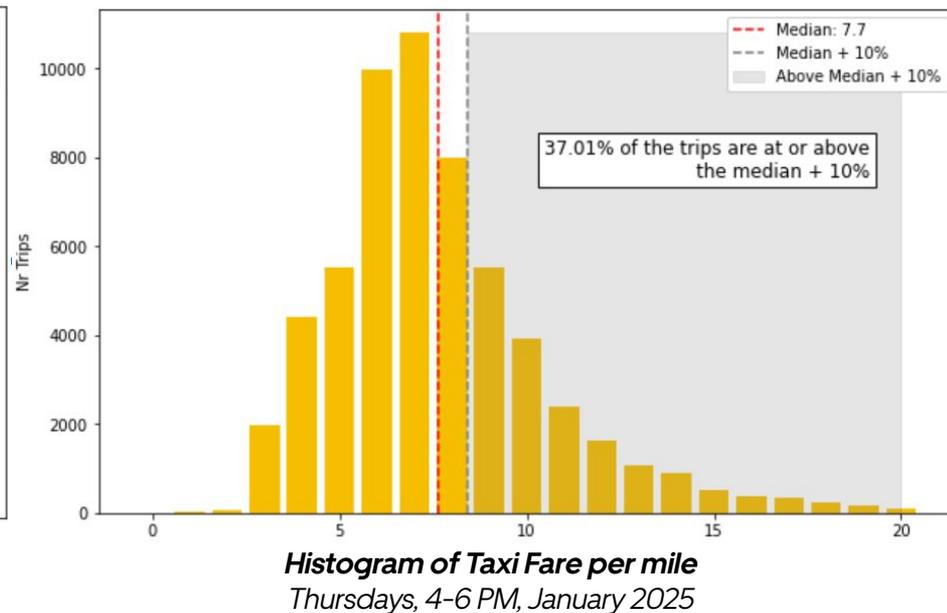
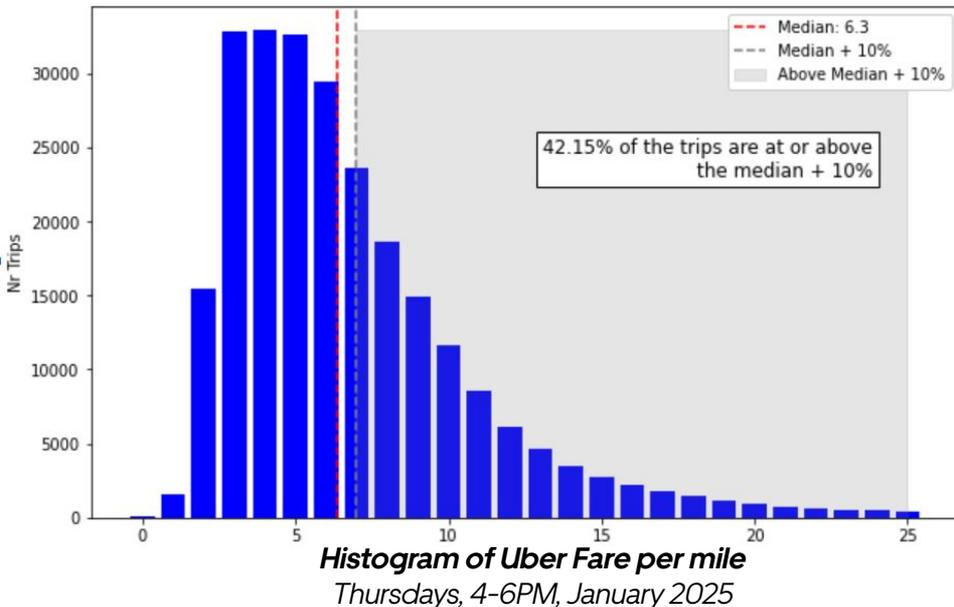


Histogram of Taxi Fare per mile
January 2025

In January 2025, [publicly available TLC data](#) shows that **38% of taxi trips** were a 10%+ disparity from median fare per mile. Under OAG’s proposed “general rule” [600.5(b)(2)(ii)], **over 1.2 million NYC taxi fares** were *prima facie* “price gouging” in a single month.

“Industry Benchmark”: 40% of NYC Fares Violate Proposed Rule

“[OAG’s] rationale for a median similar-day-similar-time-similar-location benchmark is that **ride-hailing pricing depends primarily on day, time of day, and location; maintaining these three as constant as can be practically done has the greatest chance of creating a fair comparator.**” - 600.5, pg. 26.



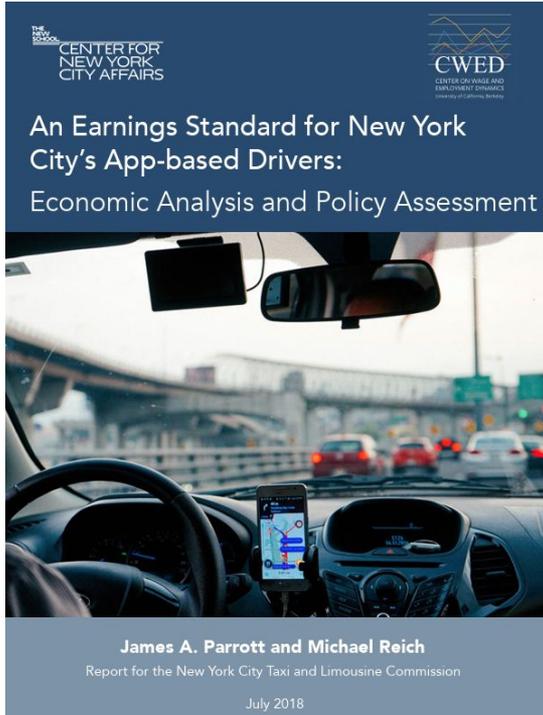
Using the [same public TLC data](#), and applying the industry rule [600.5(c)(1)(i)], the same fare variation applies **just within NYC**. A 20-mile rolling radius – that ignores the disparate NYC/NYS regulatory schemes – **will introduce even greater variation in fare per mile**.

Rider Fares Reflect a Multitude of New York Policy Goals:

Policy Goal	Agency & Description
Driver Pay & Benefits	In 2023, Attorney General James negotiated a minimum hourly pay rate for all NYS drivers: \$27.58 per Active Hour (as of March 2025). New York is one of a small number of states to guarantee driver minimum pay.
Driver Pay	TLC sets minimum per mile and per minute pay rates for NYC drivers. TLC raises rates annually according to Consumer Price Index [59D-22].
Congestion/ Driver Pay	In 2018, the NYC City Council imposed a first in U.S. vehicle licensing cap – freezing supply. In 2023, TLC attempted to open up licensing for electric vehicles, and the Taxi Workers' Alliance sued. Litigation is ongoing and supply remains frozen.
Driver Pay/Congestion	Under a complex scheme created by economists (Parrot & Reich), TLC became the only regulator in U.S. that manages driver activity down to the minute – through an industry “utilization” standard – measuring how busy drivers are & blocking new entrants.
Congestion	Since 2019, the NYS legislature has imposed a Congestion Surcharge to all Uber rides in Manhattan below 96th St. A second MTA congestion charge imposes double the per-trip rate for Uber vs. taxi.
Fare Regulation	TLC requires Uber to file maximum rider rates [59D-16(a)]; Charging riders more than rate on file with TLC is prohibited [59D-17(a)].
Fare Transparency	On driver receipts, TLC requires Uber to disclose rider fare, an itemization of driver earnings, and all deductions [59B-18(f)(5)]. On rider receipts, Uber must provide a detailed itemization of components of fare riders paid [59D-20(d)]
Accessibility	TLC requires that drivers using wheelchair accessible (WAV) vehicles receive higher per-mile and per-minute rates.
Driver Benefits	Every rider fare contributes to the New York Black Car Operators' Injury Compensation Fund , created by Governor Pataki (Chapter 49 of the laws of 1999)
Tolls/Fees/Taxes	Rider fares support city, state, Port Authority revenue through taxes, tolls, and fees . TLC regulations require Uber to compensate drivers for tolls incurred.
Liability Coverage	State law requires rideshare companies to carry commercial insurance that far exceeds personal vehicles – requiring up to \$1.25mm in coverage.

Policymaking Results:

Highest Driver Pay in U.S. in NYC;
NYS Among U.S. Leaders in
Driver Pay & Benefits...



THE CENTER FOR NEW YORK CITY AFFAIRS
CWED
CENTER ON WAGE AND EMPLOYMENT DYNAMICS
UNIVERSITY OF CALIFORNIA, BERKELEY

An Earnings Standard for New York City's App-based Drivers:
Economic Analysis and Policy Assessment

James A. Parrott and Michael Reich
Report for the New York City Taxi and Limousine Commission
July 2018

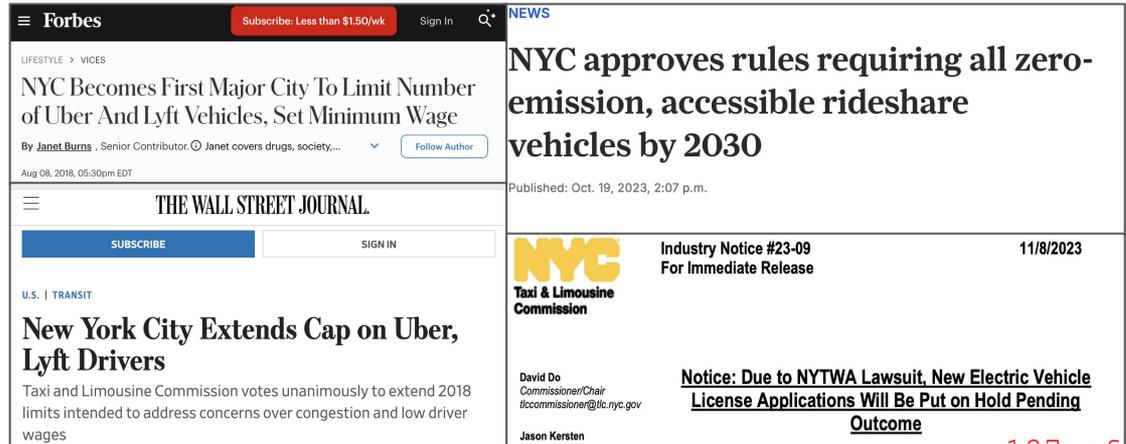
... and *highest Taxed Ridership in U.S.*

The New York Times

Your Taxi or Uber Ride in Manhattan Will Soon Cost More

An extra \$2.50 fee will be tacked onto any yellow taxi rides in Manhattan that begin, end or pass through south of 96th street, and an extra \$2.75 fee will be added for other for-hire vehicles, including Ubers and Lyfts — all before the car even starts.

... and *most Restricted Vehicle Supply in U.S.*



Forbes | Subscribe: Less than \$1.50/wk | Sign In | NEWS

LIFESTYLE > VICES
NYC Becomes First Major City To Limit Number of Uber And Lyft Vehicles, Set Minimum Wage
By [Janet Burns](#), Senior Contributor. Janet covers drugs, society,....
Aug 08, 2018, 05:30pm EDT

THE WALL STREET JOURNAL.
SUBSCRIBE | SIGN IN

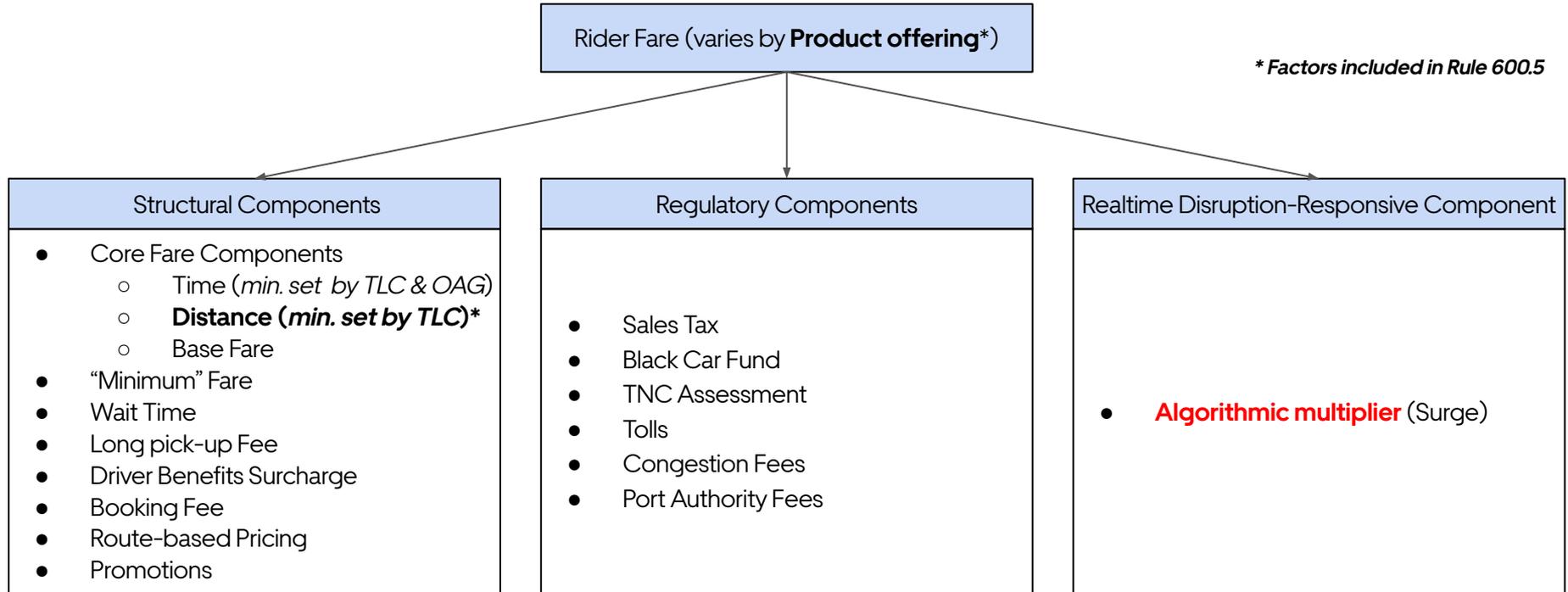
U.S. | TRANSIT
New York City Extends Cap on Uber, Lyft Drivers
Taxi and Limousine Commission votes unanimously to extend 2018 limits intended to address concerns over congestion and low driver wages

NYC Taxi & Limousine Commission
Industry Notice #23-09 For Immediate Release | 11/8/2023

David Do, Commissioner/Chair, lcommissioner@tlc.nyc.gov
Jason Kersten

Notice: Due to NYTWA Lawsuit, New Electric Vehicle License Applications Will Be Put on Hold Pending Outcome

There is no “sticky price” for a ride in New York. Instead, fares are calculated based on consumer decisions, local regulatory obligations, and **market conditions**.



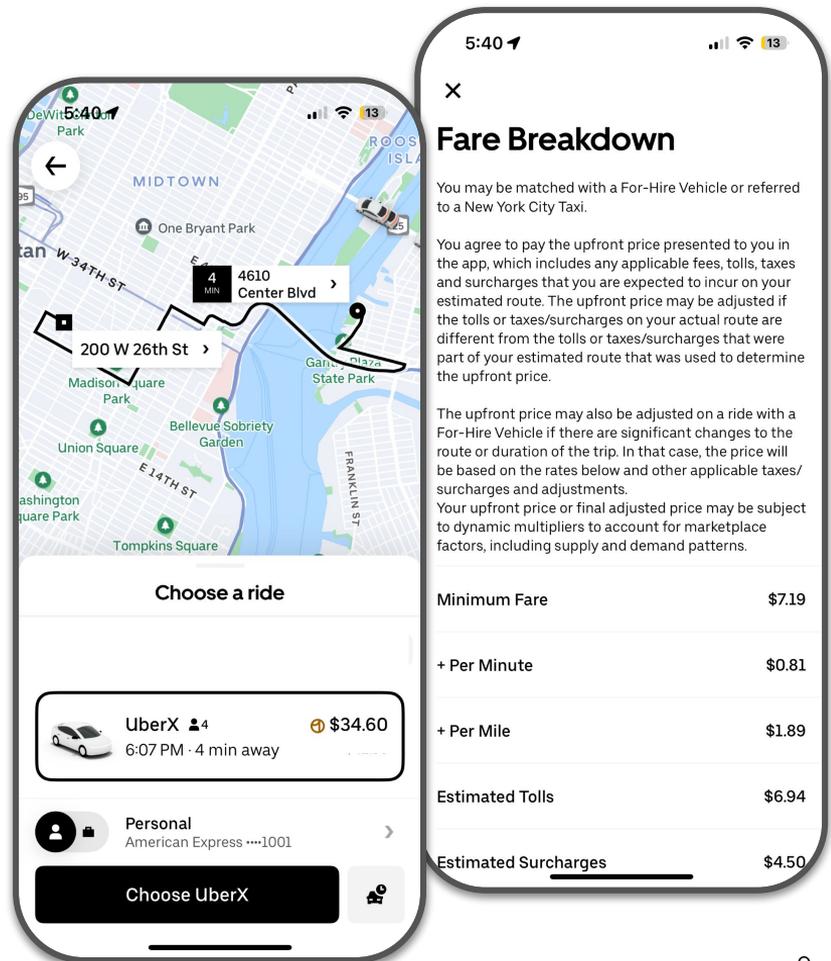
Rider fares have structural, regulatory, and marketplace components. Proposed Rule 600.5 factors in **only two components: distance** (“price per mile”); and **product offering** (“type of service”). **Any one, or a combination of these components, can be determinative of a rider fare.**

Rider Fare Components: Upfront Disclosures

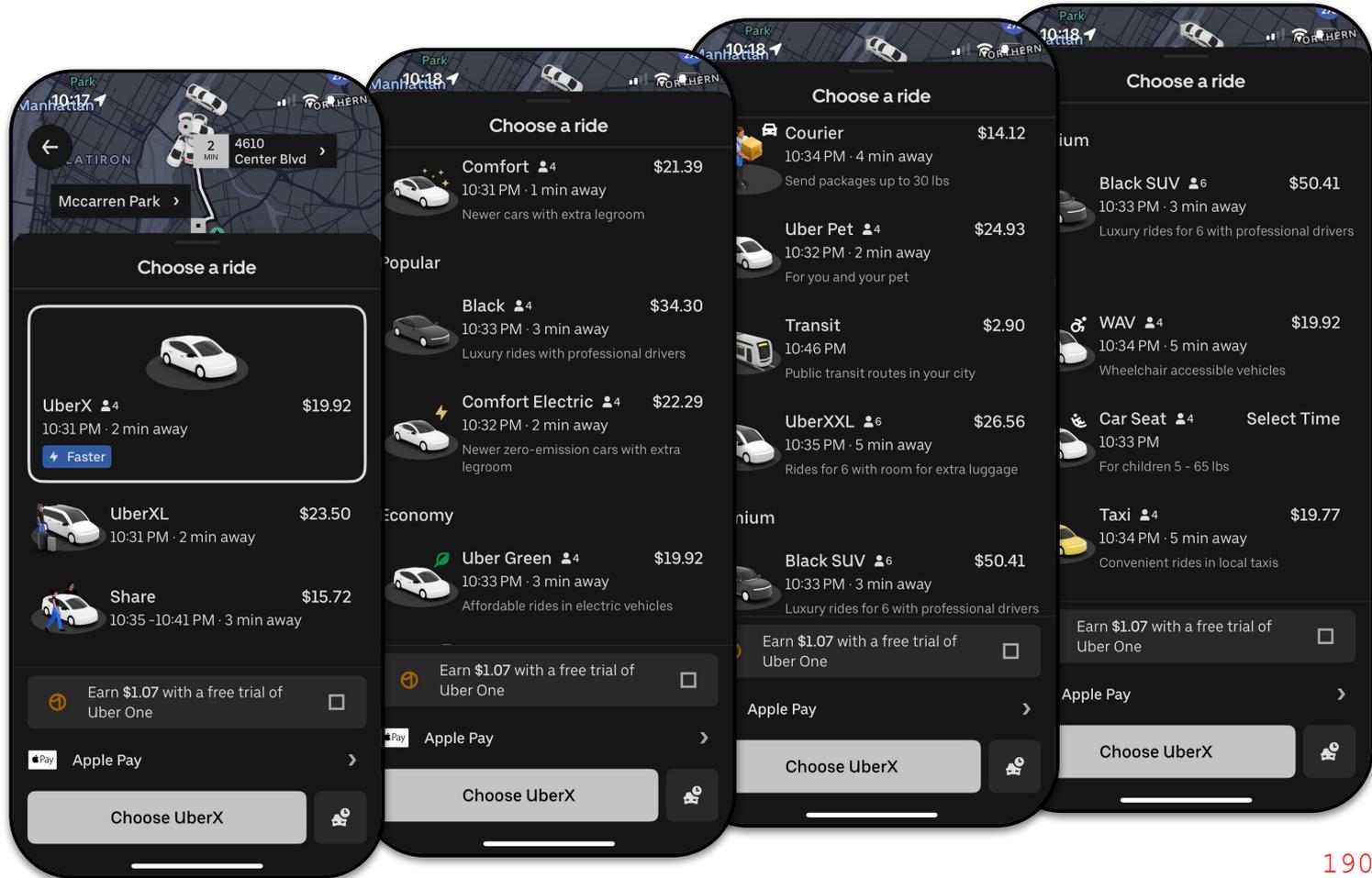
When riders open the Uber app, they see upfront fare quotes. In advance of booking a ride, riders can view the specific components of their upfront fare:

- Base fare
- Per minute calculation
- Per mile calculation
- Minimum fare
- Surcharges/Tolls
- Booking fees, and other applicable fees

Depending on the route of the trip, any one of these components could be a *significant factor* in determining the total fare.



Consumers readily comparison shop within the Uber app



Example #1 (UberX): 134% disparity in fare per mile

Wait Time Determinative

Mar 24 2025 @ 11:21 PM
UES to Morris Heights
4.5 miles | 12 min



March 24, 2025
Here's your receipt for your ride, [redacted]

Fare per mile: \$4.64

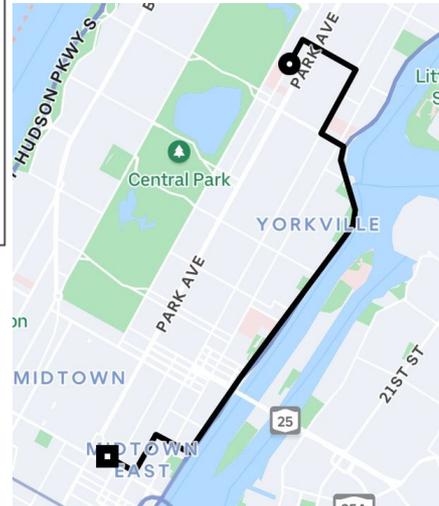


Total \$20.90

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$18.50
Subtotal	\$18.50
New York State Benefits Surcharge	\$0.27
Sales Tax	\$1.66
NY State Black Car Fund	\$0.47

Mar 25 2025 @ 10:01 AM
UES to Midtown East
4.6 miles | 32 min travel time + 15 min wait time



Thanks for being a Uber One member. Fare per mile: **\$10.86**



We hope you enjoyed your ride this morning.

Total \$49.97

You earned \$2.46 with Uber One

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$28.09
Subtotal	\$28.09
MTA Congestion Surcharge (Below 60th St)	\$1.50
Wait Time	\$13.54
NY Congestion Fee	\$2.75
New York State Benefits Surcharge	\$0.28
Uber One Credits	-\$0.99
Sales Tax	\$3.77
NY State Black Car Fund	\$1.03

In addition to a slower moving trip, the rider had the driver wait 15 minutes at pickup location

Example #2 (UberX): 122% disparity in fare per mile

Tolls & Driver Pay Regulations Determinative

Mar 12 2025 @
6:19:44 PM
Long Island City to
Bushwick
5.59 miles | 33 min

Thanks for riding, [redacted]
We hope you enjoyed your ride this evening.

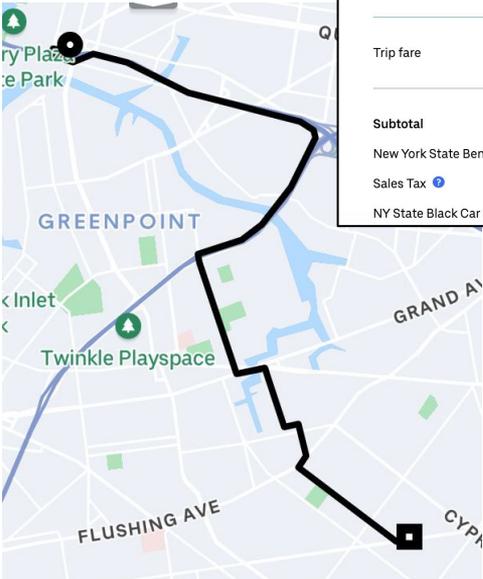
Fare per mile: **\$5.02**



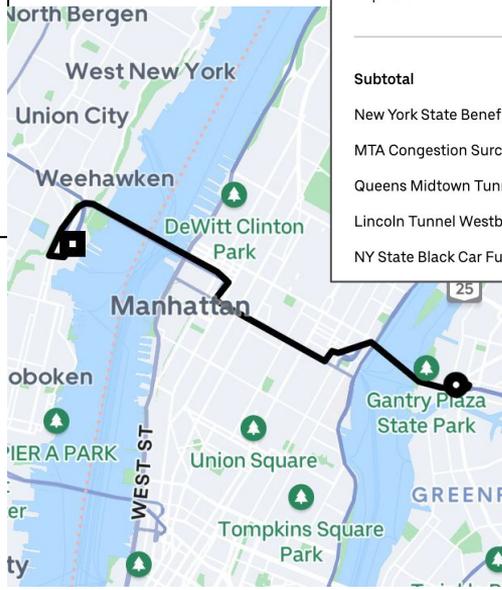
Total \$28.05

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$24.85
Subtotal	\$24.85
New York State Benefits Surcharge	\$0.34
Sales Tax	\$2.23
NY State Black Car Fund	\$0.63



Mar 14 2025 @
4:58:01 PM
Long Island City to
Weehawken, NJ
5.83 miles | 32 min



Thanks for riding,

Fare per mile: **\$11.14**



We hope you enjoyed your ride this afternoon.

Total

\$64.97

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$39.13
Subtotal	\$39.13
New York State Benefits Surcharge	\$0.35
MTA Congestion Surcharge (Below 60th St)	\$1.50
Queens Midtown Tunnel	\$6.94
Lincoln Tunnel Westbound	\$16.06
NY State Black Car Fund	\$0.99

TLC regulations mandate higher driver pay rates for "Out-of-town" time

Trip incurs tolls and congestion fees

Example #3 (UberX): 17% disparity in fare per mile

Time Determinative

Thanks for being an Uber One member,

Fare per mile: **\$8.23**

We hope you enjoyed your ride this evening.



Total

\$69.93

You earned \$3.62 with Uber One

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$59.82
Subtotal	\$59.82
NY Congestion Fee	\$2.75
New York State Benefits Surcharge	\$0.51
Sales Tax	\$5.34
NY State Black Car Fund	\$1.51

Mar 7 2025 @ 5:39 PM
DUMBO to Upper East Side
8.50 miles | 59 min



Thanks for riding,

Fare per mile: **\$6.83**

We hope you enjoyed your ride this evening.



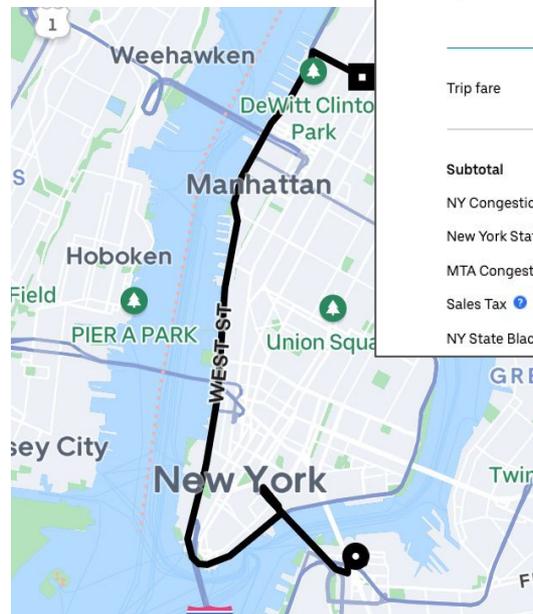
Total

\$58.02

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$47.66
Subtotal	\$47.66
NY Congestion Fee	\$2.75
New York State Benefits Surcharge	\$0.51
MTA Congestion Surcharge (Below 60th St)	\$1.50
Sales Tax	\$4.40
NY State Black Car Fund	\$1.20

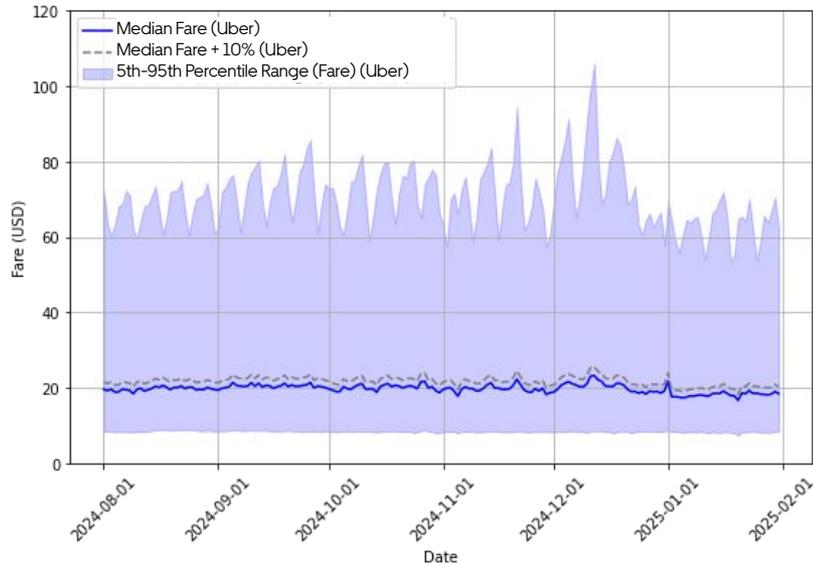
Mar 14 2025 @ 8:11 PM
DUMBO to Columbus Circle
8.49 miles | 31 min



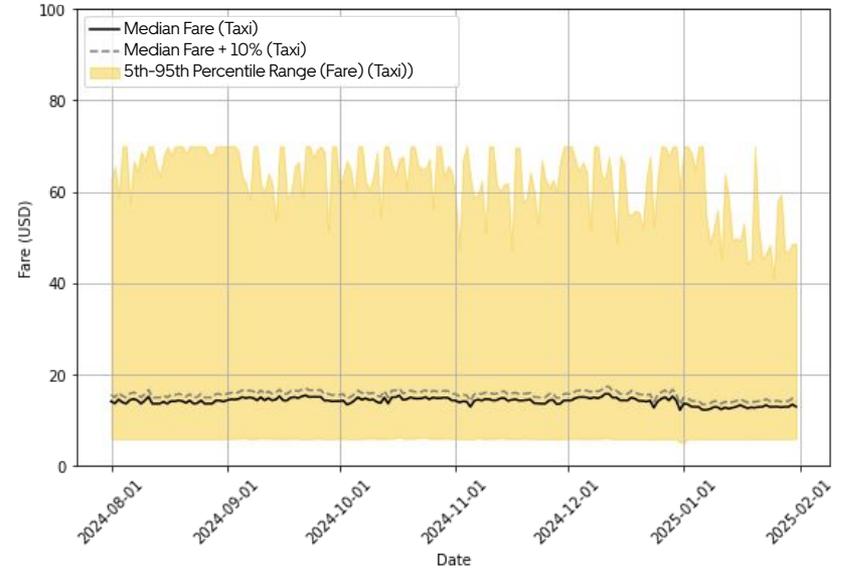
TLC Data: 10%+ Variation is “Characteristic of Normal Market Behavior”

“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... **[r]egrettably, no commentator provided any evidence to substantiate this premise.**” - OAG Staff Report, pg. 22

NYC Median Uber Fare (Excluding Taxes & Fees)



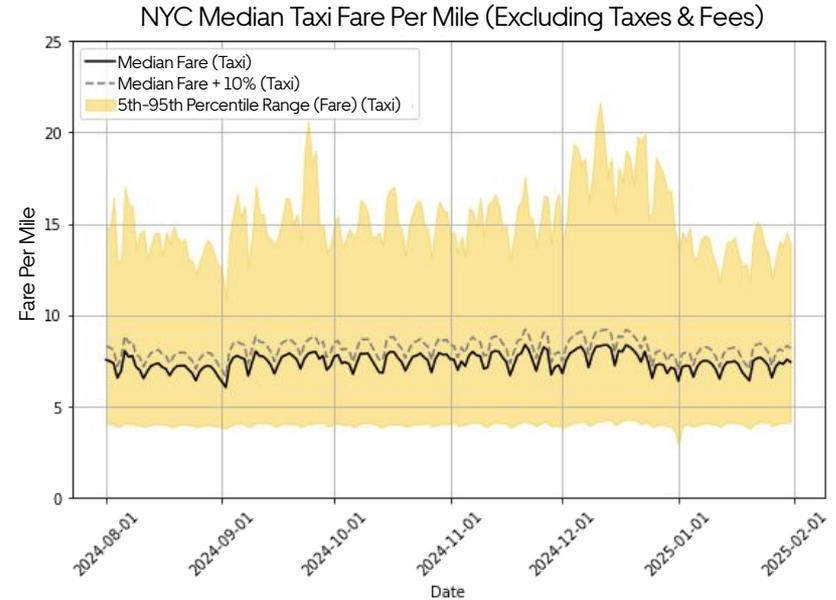
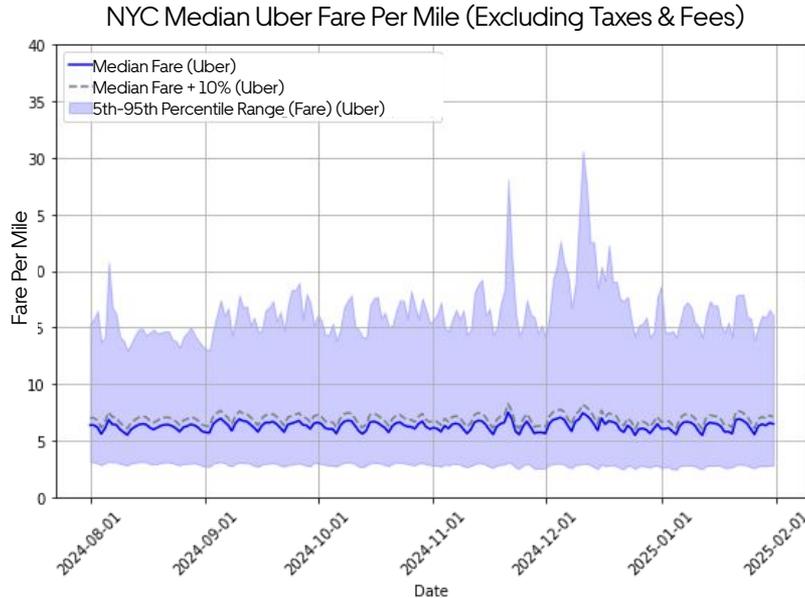
NYC Median Taxi Fare (Excluding Taxes & Fees)



[Public TLC data](#) shows that, in aggregate, even excluding taxes and fees, **10%+ fluctuations in “median fare” occur constantly – within a single day, within a month, and over the course several months.**

TLC Data: 10%+ Variation is “Ordinary Course”

“A review of BLS CPI data indicates 10% or greater price changes occur overwhelmingly during times of abnormal market disruption and not in the ordinary course of business..” - OAG Staff Report, pg. 37

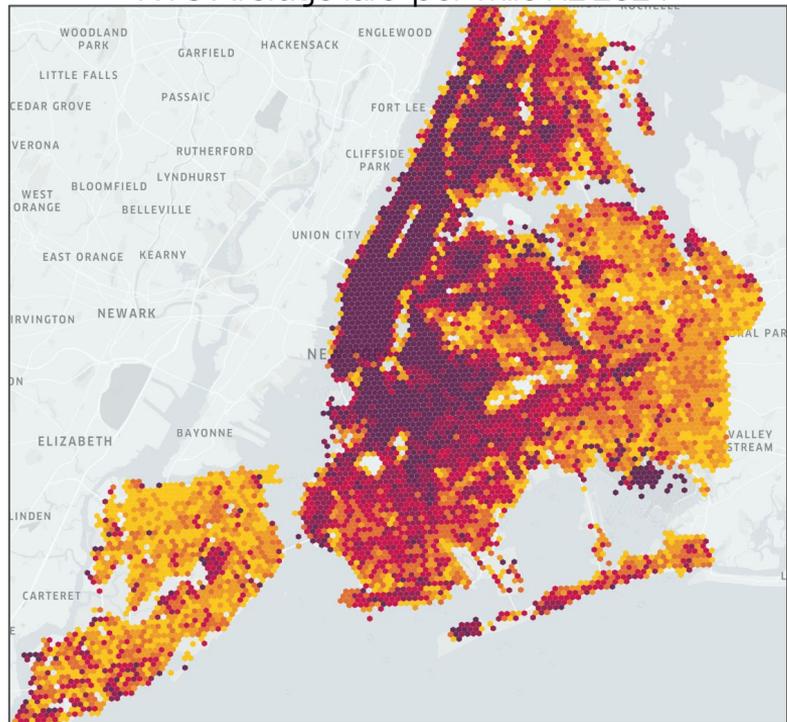


The same variation holds firm when applying OAG’s “per-mile” metric – and excluding taxes & fees. As shown in fare per mile data for all NYC trips from August ‘24 to Feb. ‘25, 10%+ changes are a constant; not an a signal of a “disruption.”

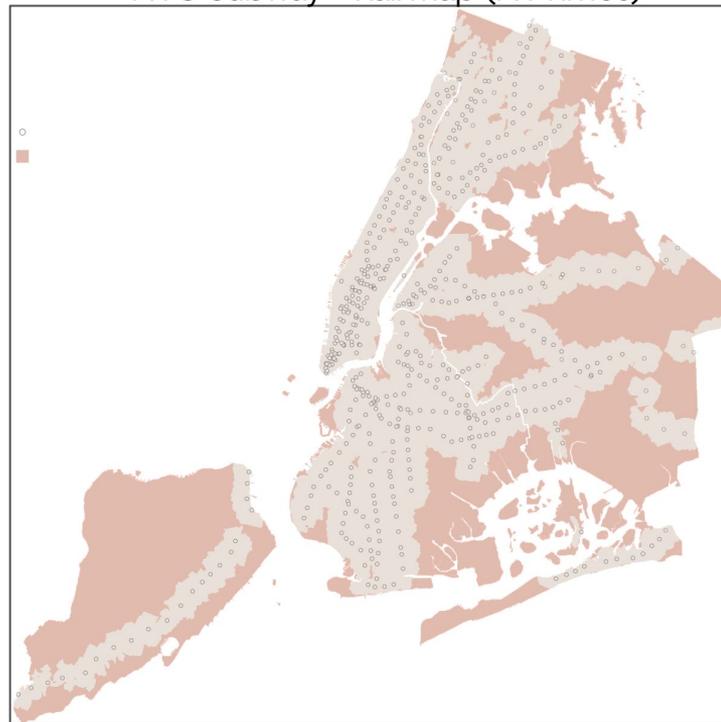
In New York City, Average Fare Per Mile Varies Greatly

Average fare per mile are highest in Manhattan and inner Brooklyn/Queens. **Dynamic pricing allows Uber to keep fares affordable in communities underserved by public transit. Driver pay rates mandated by TLC apply uniformly across the five boroughs – leading to lower margins for these more affordable trips.**

NYC Average fare-per-mile H2 2024

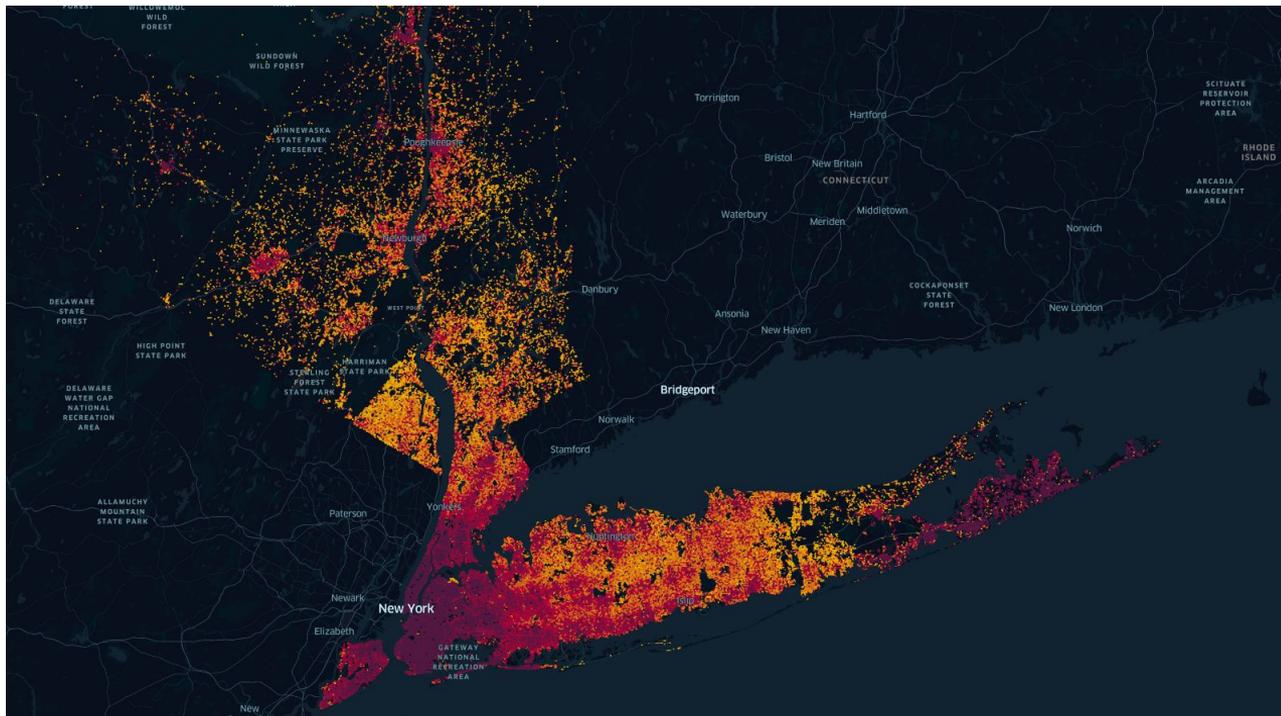


NYC Subway + Rail Map (NYTimes)



Fares are *Structurally Different* Outside of NYC

Average fare per mile is *structurally higher* in New York City. Demand is higher, trips are slower, riders pay higher fees, and drivers must earn TLC-mandated pay rates. Outside of New York City fares trend significantly lower, demand is lower, but the marketplace must sustain the minimum pay standard set by OAG. Under the AOD, upstate **NYS must make at least \$27.58/on-trip & en route hour**. In February 2025, publicly available TLC data shows that **NYC drivers made \$59/on-trip hour**.



Example #4: 39% disparity in fare per mile

Regulatory Obligations (NYC vs. NYS Driver Pay) are Determinative

Mar 31 2025 @ 6:52 PM
 Riverdale to Van Nest
 6.86 miles | 27 min

Thanks for riding, [Redacted]

We hope you enjoyed your ride this afternoon.

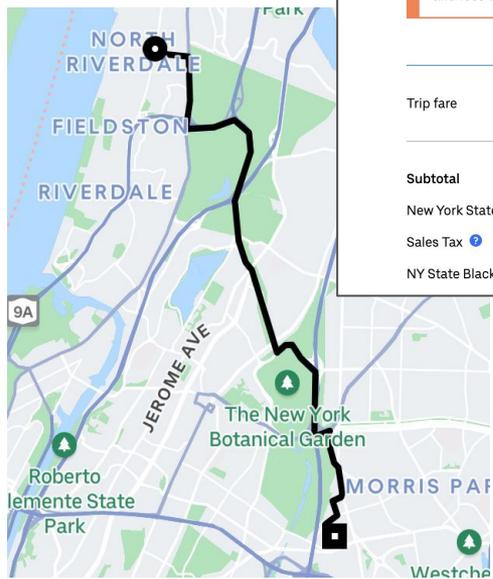
Fare per mile: **\$4.95**



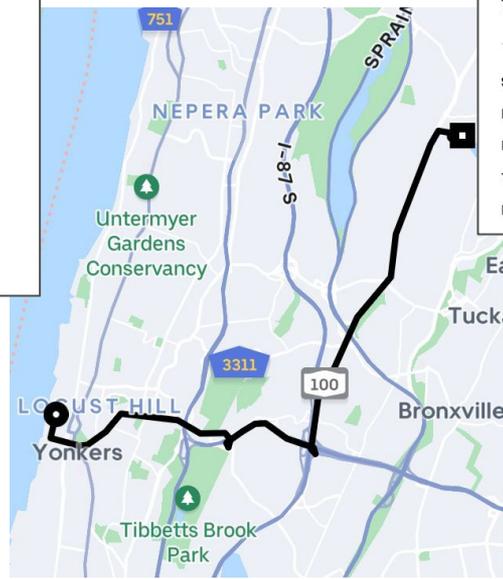
Total \$33.96

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$30.09
Subtotal	\$30.09
New York State Benefits Surcharge	\$0.41
Sales Tax	\$2.70
NY State Black Car Fund	\$0.76



Mar 27, 2025 @ 8:46 PM
 Trip within Yonkers
 6.95 miles | 21 min



Thanks for riding, [Redacted]

We hope you enjoyed your ride this evening.

Fare per mile: **\$3.01**



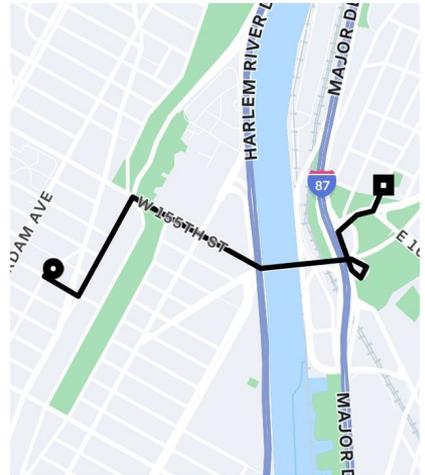
Total \$20.91

In December 2024 in New York State outside of NYC, roughly 25% of customers' fares went toward covering government-mandated commercial insurance for rideshare/TNC (transportation network company) trips. [Take action to bring down costs.](#)

Trip fare	\$13.16
Subtotal	\$13.16
Booking Fee	\$5.84
New York State Benefits Surcharge	\$0.63
TNC Assessment Fee	\$0.79
NY State Black Car Fund	\$0.49

Example #5: Negative Margin on Upper Manhattan to Bronx Fare

Sample UberX trip:
March 16, 2025 @ 8:32 pm



Rider Receipt

March 16, 2025

Here's your receipt for your ride, [REDACTED]



Total \$10.93

[Learn more](#) about the government-mandated pricing rules, taxes, and fees that make trips in NYC more expensive.

Trip fare	\$9.74
Subtotal	\$9.74
New York State Benefits Surcharge	\$0.08
Sales Tax	\$0.87
NY State Black Car Fund	\$0.24

Affiliated with UBER USA, LLC (B03404)

Driver Receipt

Your earnings

Fare	\$10.49
Distance	\$1.82 <small>Distance 1.29 mile × \$1.41/mile (rounding applied)</small>
Time	\$8.67 <small>Time 14.33 minute × \$0.61/minute (rounding applied)</small>

Your earnings **\$10.49**

Uber's total service fee for your trips from Feb 10 - Mar 10 was 17.7% of the total customer price (excluding tips). Tap to see the weekly breakdown at drivers.uber.com.

Uber service fee summary

Total customer fare	\$10.93
---------------------	---------

Total amount before promotions (excluding the price of items paid to restaurants and stores)

Uber Service Fee - \$0.75

This is the amount we take to serve our users and grow our business. This negative amount means what you earned beyond fares (such as promotions) was greater than the Uber service fees you owed.

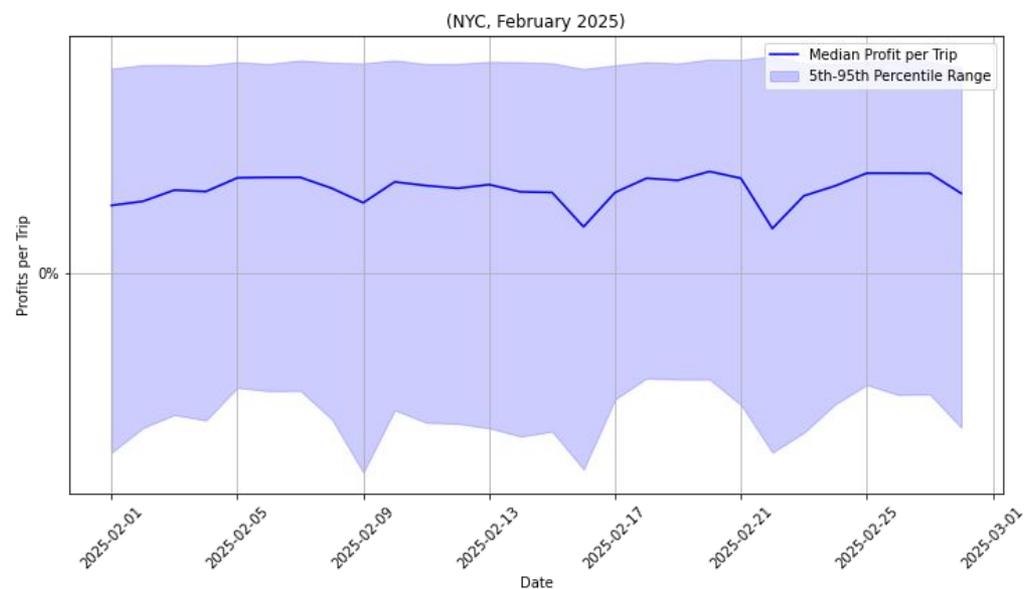
\$9.74 (Trip fare minus taxes/tolls/fees) - \$10.49 (Driver Earnings)

Driver earned \$10.49

Total rider fare was \$10.93, including taxes/tolls/fees

In New York's Dynamic Rideshare Marketplace, Per-Trip Profits Vary Greatly

“It is only if the increase of price increased the ride-hailing company’s profit margins for that ride that the ride-hailing company has violated the price gouging statute.” - OAG Staff Report, pg. 19



In addition to fare-per-mile variation, Uber's margins per-trip vary greatly. Unlike a seller of flour, Uber does not maintain a consistent profit margin in the normal course of business. Uber maintains a dynamic marketplace – where the reliability, affordability, regulatory costs, and consumer demand require continuous flexibility in per-trip economics. Variable and negative margins are commonplace in the transportation sector (e.g.. domestic air travel, bike share, NYC Ferry, Amtrak).

Algorithmic Multipliers & “Abnormal Disruptions”

Algorithmic Multipliers: “Surge”

*“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**... [s]econd, **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.” - OAG Staff Report, pg. 9.*

Rider Surge Represents “Brief Periods of Price Spikes”

In brief periods of very high demand, an algorithmic multiplier (surge) may automatically increase fares. Whenever rates are raised due to surge, the Uber app affirmatively notifies riders. Some riders will choose to pay, while some will choose to wait a few minutes until fares go back down.

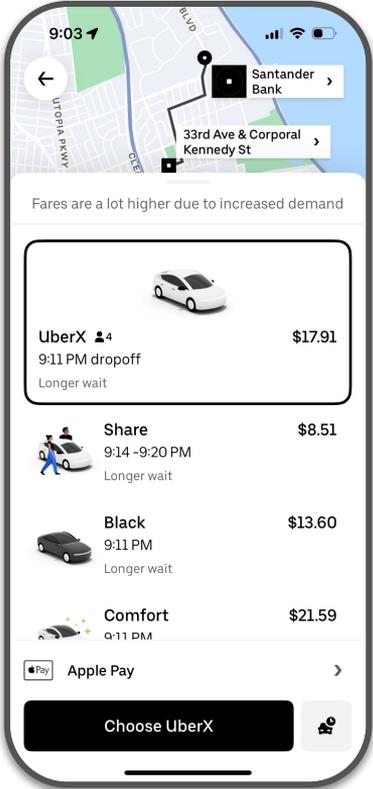
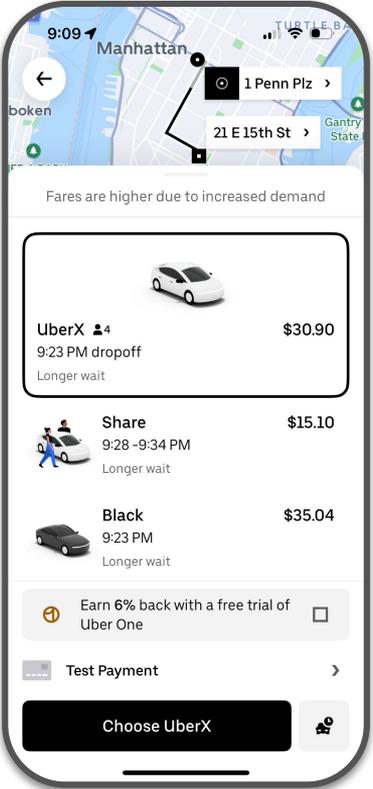
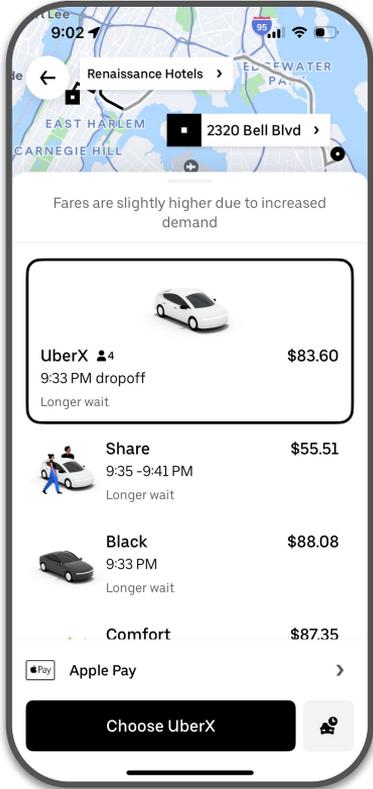
Driver Surge is How Uber “Expends Immense Resources on Supply Expansion”

During times of peak demand, drivers will see surge in their app as a dollar figure that is based on their location. This allows drivers to earn more for driving in busier areas. By moving toward areas of high demand, drivers balance the marketplace – preventing it from unraveling.

Consumers receive contextual information regarding surge

“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...**”
- OAG Staff report, pg. 12

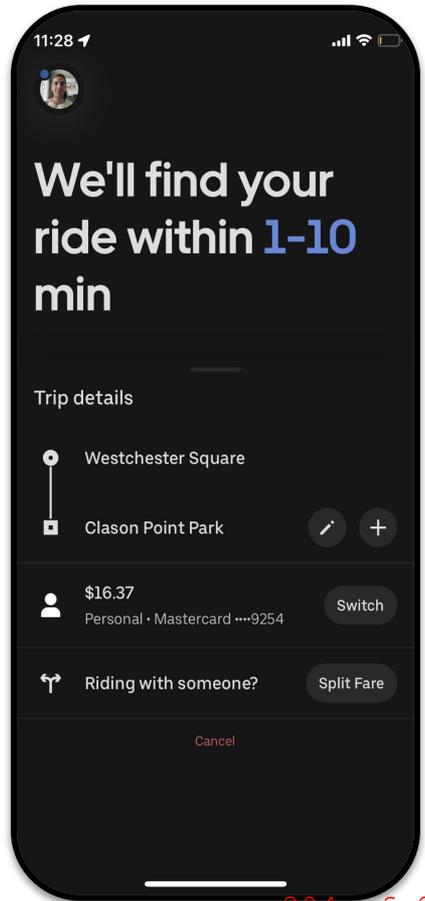
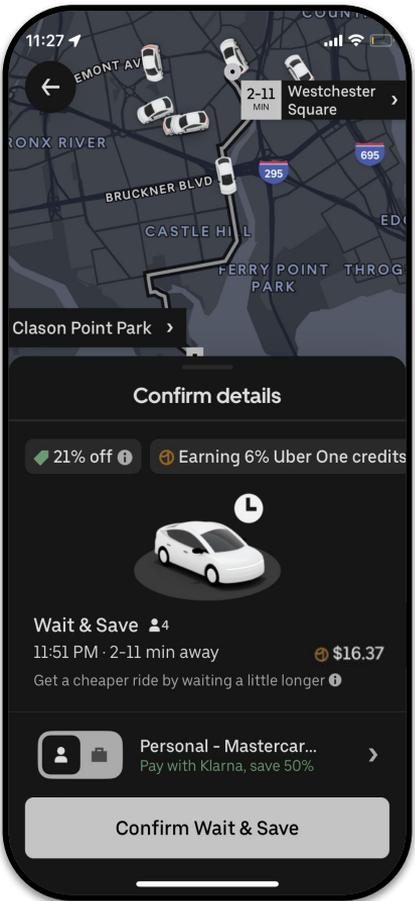
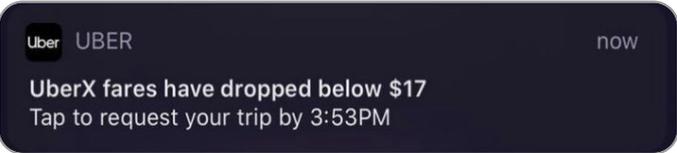
When prices surge, riders see total upfront prices – and are **warned that fares are higher due to increased demand**. “Comparison” shopping is instantaneous – riders see fares for Uber’s discounted products (Share & “Wait and Save”). **In seconds, riders can also comparison shop by simply opening a competitor’s app.**



Surge Notices: Price Decrease Alerts and Wait & Save

“...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.*” - OAG Staff report, pg. 12.

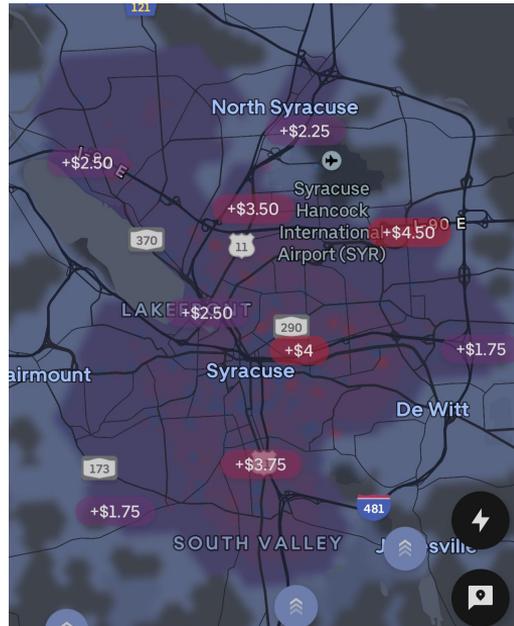
Rather than “merely take advantage,” surge temporarily “alleviates” supply shortages. Surge pricing temporarily drives down rider requests. It also signals where drivers can go to meet “spikes in demand.” During surge, riders see a “**Wait & Save**” option – allowing them to avoid price increases by simply be open to waiting. **When demand normalizes, Uber proactively notifies rider of specific price drops.**



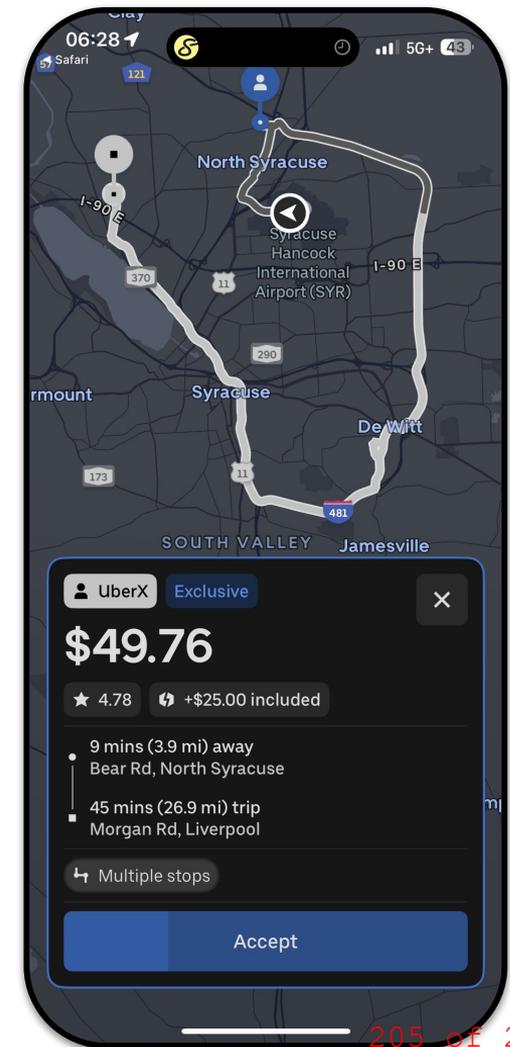
Why Surge Matters to NY Drivers

Rider surge is an algorithmic multiplier that applies to components of a fare. Riders see surge information in the “increased demand” banner – and it is included in the total upfront fare.

Driver surge represents a dollar incentive viewable on a map, which is based on a driver’s location. If drivers drive in a surge zone, they pick up the cash incentive for their next trip – whether that trip starts in the surge zone or not.



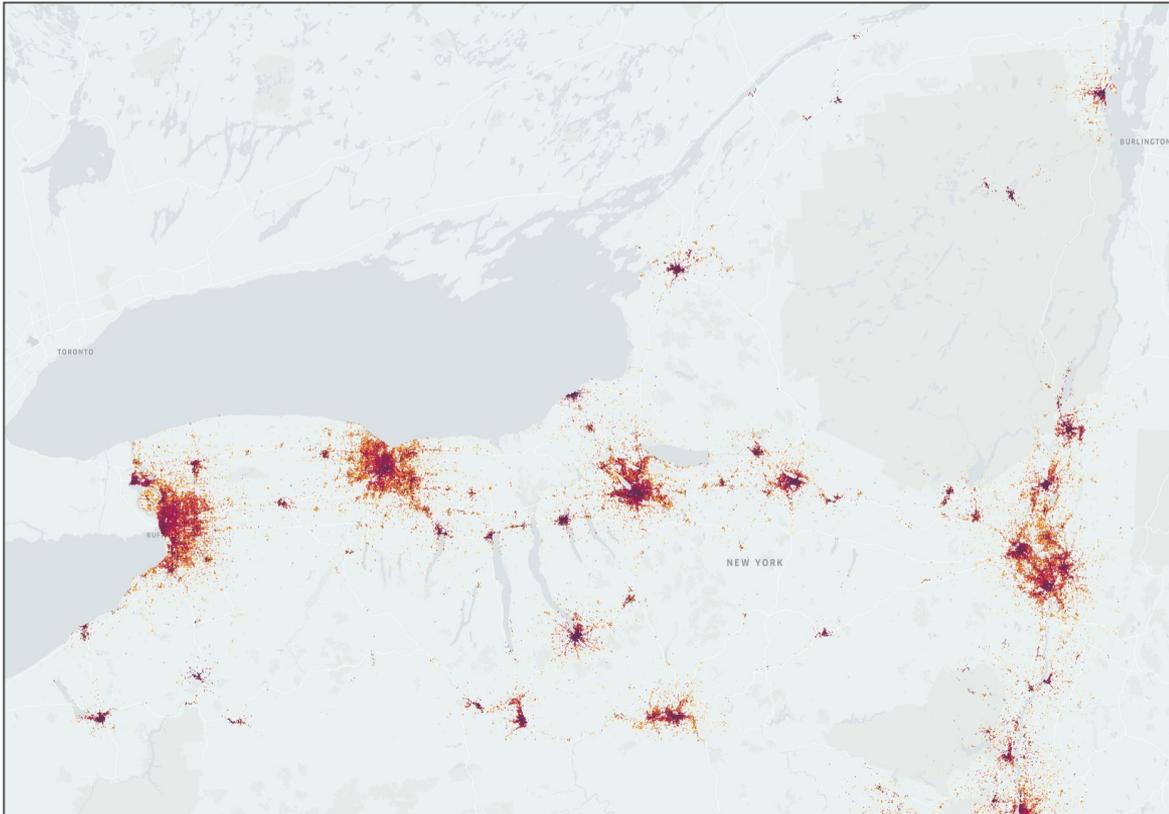
Drivers in upstate areas rely heavily on surge to determine where and when they should drive with rideshare companies.



Surge Pricing Provides Critical Income to Upstate Drivers

*“Attorney General concludes that **as to all rural businesses this rule has no adverse impact** and may well be beneficial by restraining price increases by suppliers of essential products. - 600.5, pg. 35.*

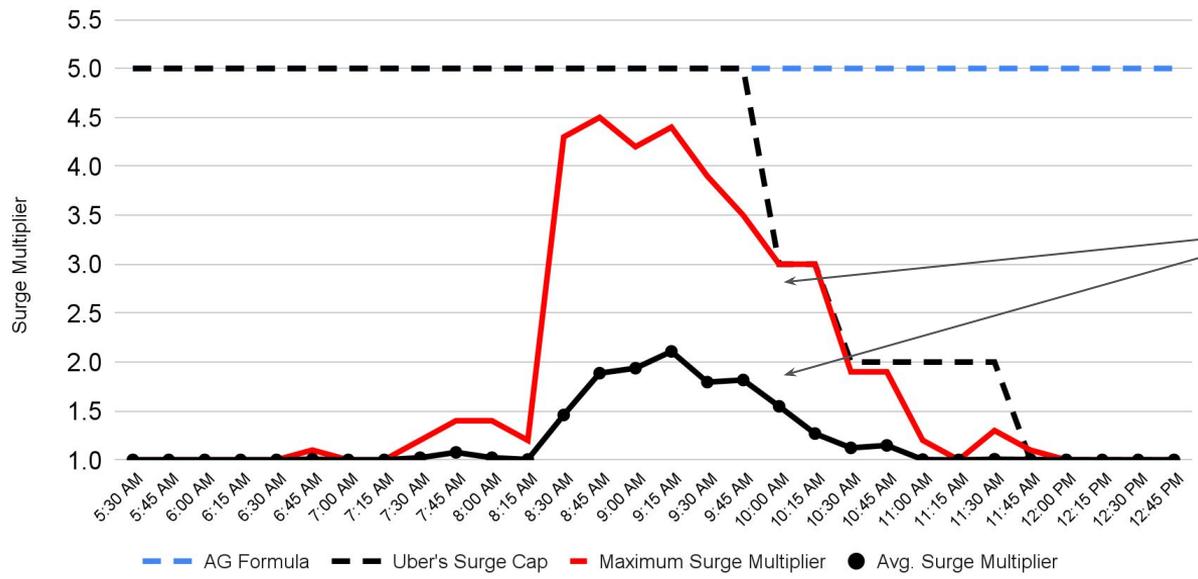
A rule that focuses on an arbitrary median would adversely affect the earnings of Upstate drivers. Upstate drivers work in large geographical area – where their income opportunities are concentrated in smaller population centers. **Surge allows these drivers to maintain income during sporadic demand – while keeping off-peak rider fares low.** Brief periods of high demand are critically important– ski weekends, Bills games, summer events in Hudson Valley, and college nightlife.



Surge Multipliers are Automated – Caps are a Necessary Intervention

During emergency events, Uber's surge cap procedures prioritize rider, driver, and public safety.

Surge Multiplier in Sunset Park (4/12/22)



Because of the unique role the Uber platform plays in local emergency response – and its experience in various jurisdictions that enforce surge caps – emergency protocols have been refined through experience.

Guidance, Actionability, and Public Safety

Without Guidance on Triggers, Uber Cannot Apply Controls

Industry Experience: “Disruptions” that Triggered Uber-Initiated Surge Caps (‘23-’25)

“Stress of Weather”?

- **“Lake Effect” Snow Storm:** 1/20/2025, Upstate counties
- **Winter Storm:** 12/11/24, Upstate Counties
- **Winter Storm:** 11/30/24, Upstates Counties
- **Tropical Depression Debbie:** 8/9/24, NYC & suburbs

“Convulsion of Nature” ?

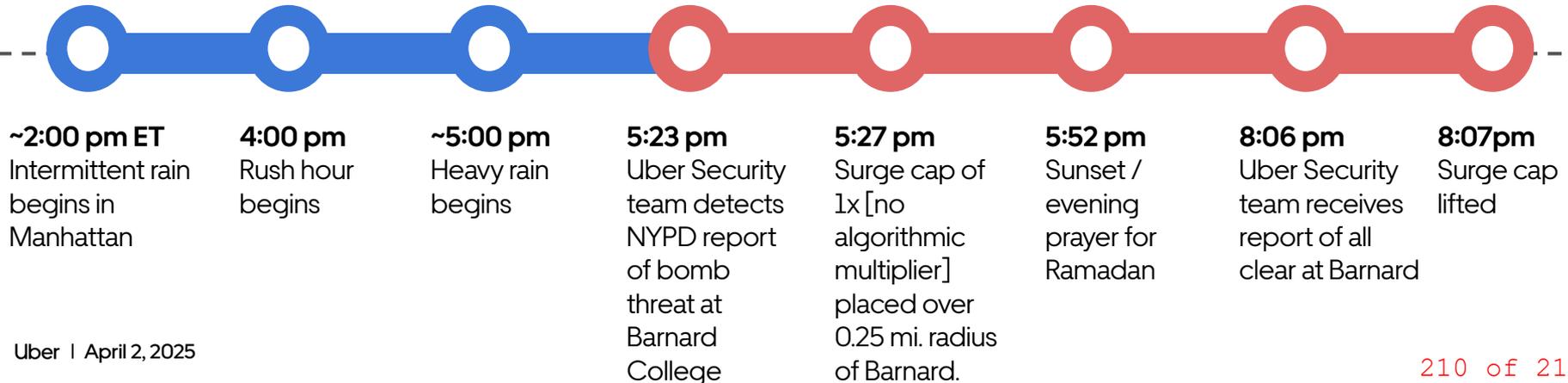
- **Wildfire:** 3/8/2025, Westhampton
- **Flash Flooding due to Tropical Storm Ophelia & Transit Shutdown:** 9/29/23, NYC
- **Air Quality Red Alert:** 5/7/23, NYC

“Civil Disorder”?

- **Barnard Bomb Threat:** 3/5/25 Upper Manhattan
- **Active shooter:** 1/2/25, Queens nightclub
- **Active shooter:** 9/1/24, evacuation of New York State Fair, Syracuse
- **Rainbow Bridge Explosion:** 11/22/23, Niagara Falls
- **Manhole Explosions:** Brooklyn, 4/30/23

Public Safety & Surge: NYC, March 5th, 2025

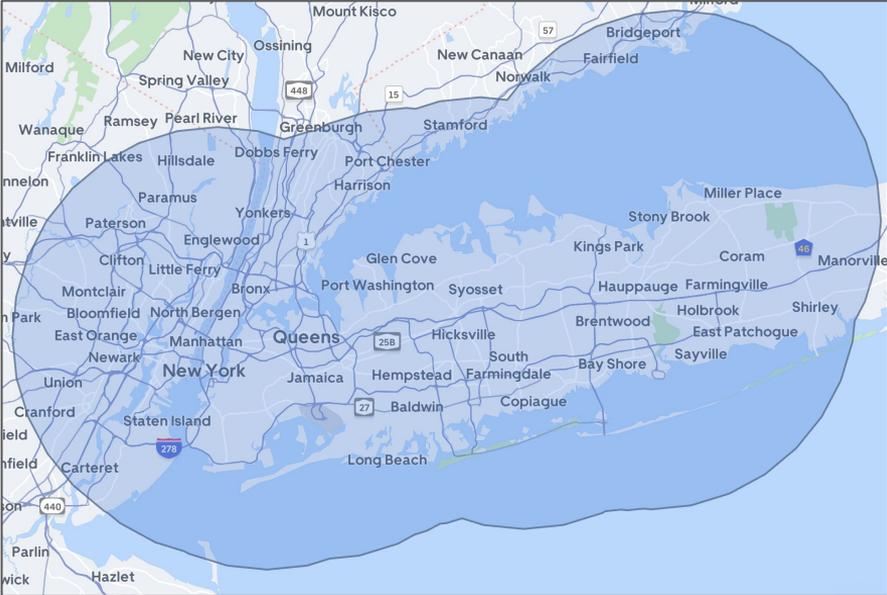
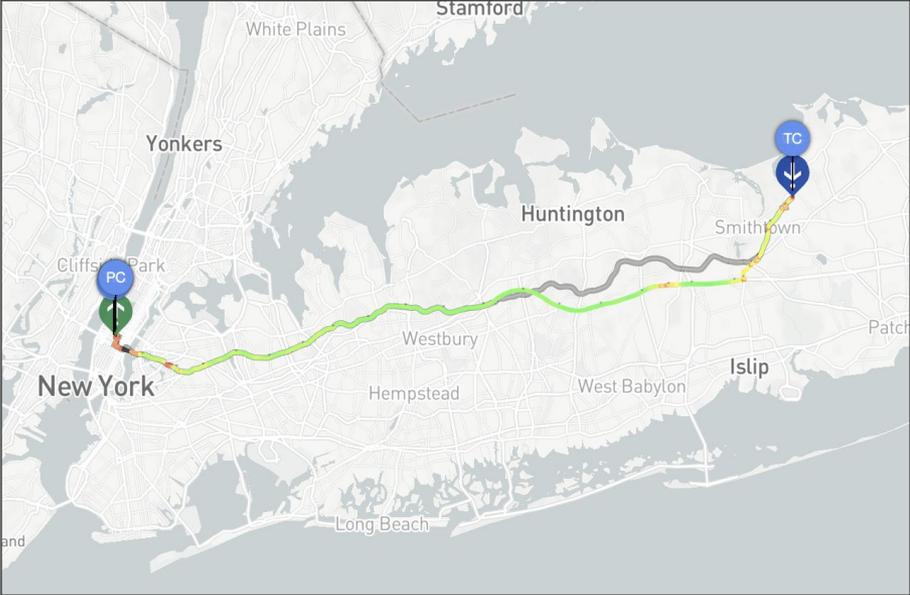
Overlapping events can trigger surge. On the evening of March 5: (1) heavy rain fell during the evening rush hour; (2) a large number of Uber drivers were temporarily offline due to Ramadan; (3) an a NYPD alert of bomb threat caused the evacuation of a college campus. What followed was surge pricing throughout Manhattan – but capped under Uber’s emergency protocol following the NYPD Alert. **Guidance is needed to develop protocols to comply with G.B.L. § 396-r in real time.**



20-mile “Rolling” Radius Unworkable

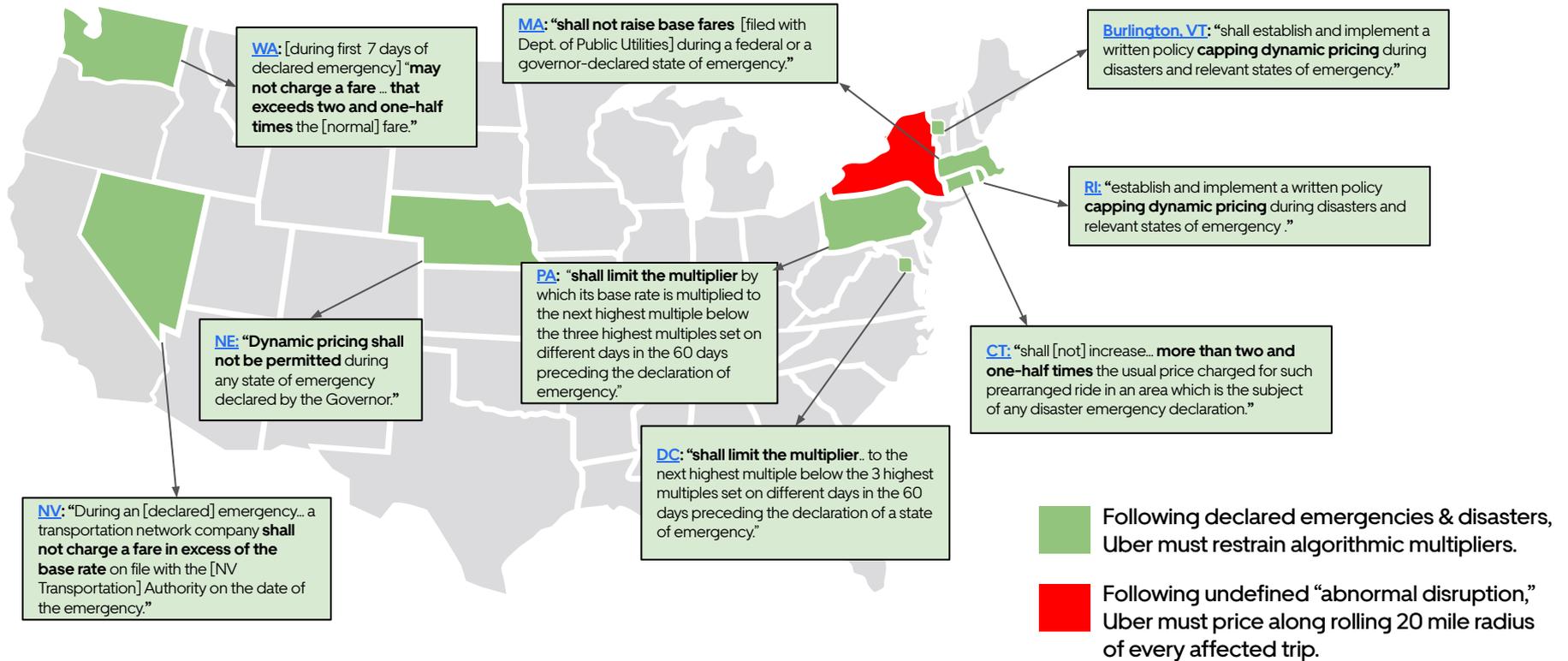
Uber trip from Midtown Manhattan to Stony Brook, LI

Under the proposed rule, a single trip would be compared to the median price of all requests along the route of the trip for the similar time period for the prior 4 weeks. A trip from Manhattan to Long Island would include requests from Westchester, Nassau and Suffolk counties - markets with vastly different regulatory, tax, and driver pay rules. Undefined triggers would require price controls to police a *rolling 20-mile radius of every single potential trip* – and calculate fares based on data for every other trip in its path over the last four weeks – a technological impossibility.



Rulemaking Proposal + Principles

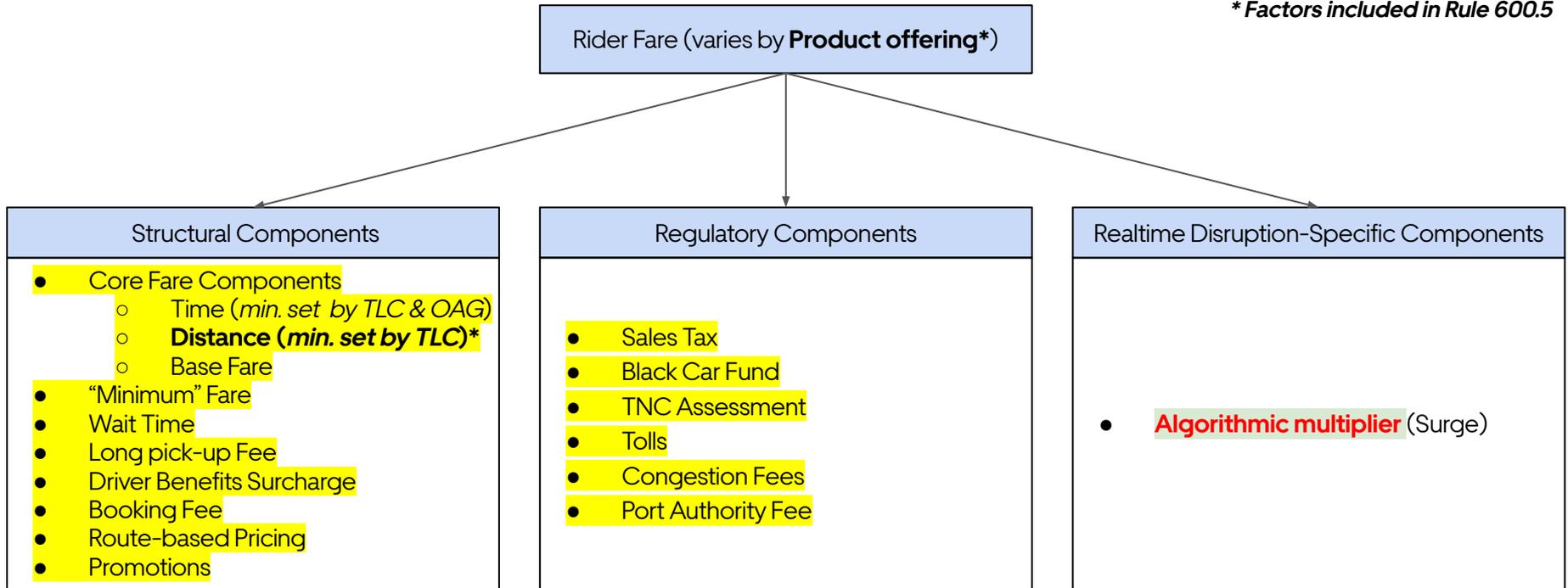
All 9 Jurisdictions with Rideshare-Specific Rules Restrain Algorithmic Multipliers



Jurisdictions with “stricter” disparity thresholds (CT & DC) and price comparisons (WA) than Rule 600.6 restrain multipliers. 218 21.7

OAG Must Consider Factors Determinative of Fares

* Factors included in Rule 600.5



Rather than creating a needlessly complex rule that accounts for all components that determine fares, the OAG should directly address the factor that matters during disruptions: the algorithmic multiplier.

Proposal: Algorithmic Multiplier Restriction

During “abnormal disruptions” restrain the algorithmic multipliers that cause sharp increases on rider fares. Following the model of neighboring Connecticut, a state with a “stricter” disparity threshold (0%), OAG should implement a cap of **2.5x** on algorithmic pricing components during declared emergencies within the areas impacted by the emergency..

- Restrains the fare component rideshare companies most control – and the most powerful tool they have to increase fares;
- Comports with all other rideshare-specific price gouging prohibitions;
- Provides a clear deterrence & enforcement for OAG;
- Responsive to consumer complaints – provides riders with a clear benchmark to evaluate the prices they see – and report violations.
- Harmonizes regional rules – more than 1.5 million New York trips begin or end in CT annually. Bordering states PA & MA similarly restrain multipliers.

CT | AN ACT REGULATING TRANSPORTATION NETWORK COMPANIES AND TAXICABS

The act restricts a TNC's use of dynamic pricing (i.e., offering prearranged rides at prices that differ according to ride demand and driver availability). Specifically, it prohibits a TNC from increasing the price of a ride by more than 2.5 times the usual price during a disaster emergency or transportation emergency declaration by the governor or an emergency declaration by the U.S. president. It also requires a TNC that implements dynamic pricing to do the following through its digital network:

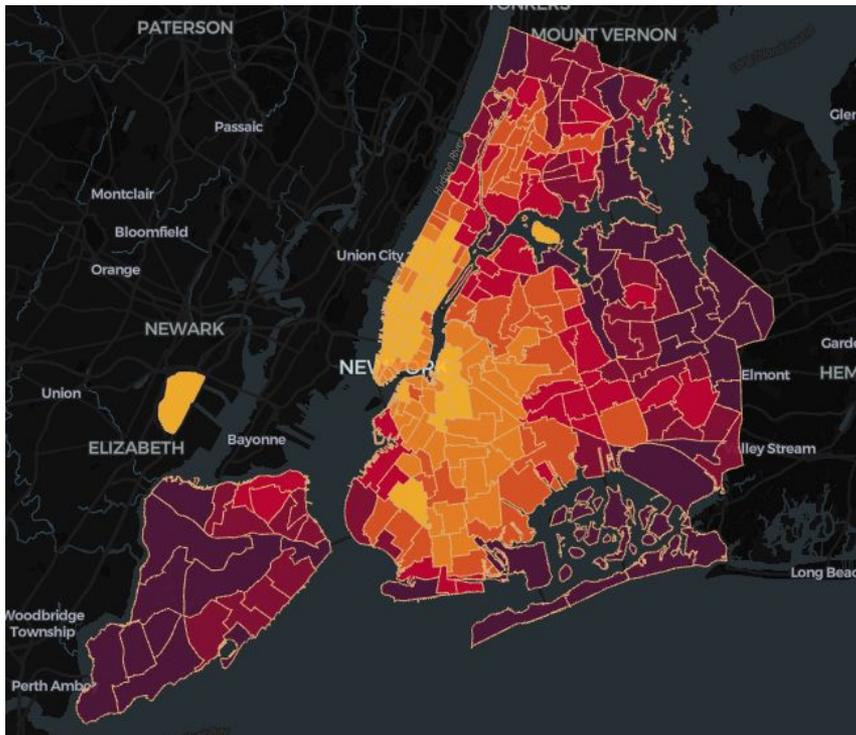
1. notify potential riders when dynamic pricing is in effect before the request can be submitted,
2. provide a fare estimator that allows a potential rider to estimate the ride's cost under dynamic pricing, and
3. include a feature that requires a potential rider to confirm that he or she understands that dynamic pricing will be applied.

Principles for a Novel Rule

A restraint to Uber's algorithmic multiplier best addresses dynamic price gouging – as evidenced by uniformity in jurisdictions regulating rideshare fares during emergencies. If OAG must create an entirely novel approach, the following considerations should guide a proposed rule:

1. **10% increase in price does not apply to structured fares-based industry:** A rule should accurately reflect the normal course of the industry, *be supported by industry data, and not undermine complex regulatory obligations.*
2. **Provide Actionable Guidance:** Clear standards are needed so that the industry knows when – and how to comply with G.B.L. § 396-r. As neighboring jurisdictions recognize, declared emergencies are provide guidance that can immediate by acted upon by restraining algorithmic pricing. Without guidance, a rule has no deterrent effect. An ever-present specter of a price gouging will have negative unintended consequences for drivers, riders, and public safety.
3. **Build an Impacted Trip Comparison Group:** An aggregated set of fares should represent riders making *the same informed choice under similar conditions.* The aggregated group should be compared to similar group of trips that occurred *under like conditions* prior to the disruption. These similar conditions need to include the same origin – as New York's complex regulatory scheme applies based on where a trip picks up. The comparison should reflect riders who chose a similar service, traveled a similar route, under the same time/traffic conditions, and under the same regulatory scheme (taxes, tolls, fees, driver pay and benefit obligations).
4. **Account for costs in a marketplace:** Variable cost is foundational to the transportation sector – where reliability is the business. Rules based on per-fare economics do not reflect the realities of travel and dynamic marketplaces. An accounting of costs should be sufficiently aggregated across the marketplace – not focuses on a single fare.

Proposed rule has negative consequences for riders and drivers in New York State



1. **Riders will pay more:** Without guidance on controls, rideshare companies need to increase prices *at all times* in order to maintain a rolling “median” fare-per-mile (darkest areas of the map represent largest fare increases).
2. **Drivers will earn less:** Driver earnings will suffer as a result of the elimination of surge pricing. The lack of surge will lead to marketplace volatility and fewer completed trips; higher prices will lead to less rider demand. This will have a disproportionate impact on Upstate NY drivers.
3. **Reliability will suffer:** ETAs and marketplace reliability will degrade, hurting both riders and drivers.
4. **Less flexibility:** Limited pricing flexibility will mean fewer options for consumers – jeopardizing important initiatives like Access-A-Ride, Taxi, and eliminating low cost products (Share, Wait and Save).

Fares across New York will increase as a result of attempting to balance an arbitrary “median fare per-mile.”