

Notice of Proposed Rulemaking

The public is harmed when businesses that provide essential goods and services engage in price gouging during abnormal market disruptions.¹ The Office of the New York State Attorney General (“OAG”) proposes new regulations to fulfill its responsibility as administrator of the statute to effectuate and enforce Section 396-r of the General Business Law (“GBL”) and to deter profiteering during an abnormal market disruption. The proposed rules implement the purposes of the Price Gouging Law amended in June 2020.

Prior to this rulemaking, the Attorney General issued an Advanced Notice of Proposed Rulemaking, using an Information Notice in the State Register and a press release, indicating that she intended to engage in a rulemaking pursuant to her powers under GBL 396-r(5). The Advanced Notice summarized the need for rulemaking and asked several questions for public comment. In response, the Attorney General received 65 comments. Advocacy groups, consumers, industry representatives, and academics submitted comments.²

The majority of the comments addressed individual instances of possible price gouging, including comments on gas, milk, cable, and car dealerships. Of the more prescriptive comments, advocacy groups representing retail (including the New York Association of Convenience Stores and the National Supermarket Association) requested more clarity in terms like unconscionably excessive and a recognition that retailers are often accused of price gouging when their own costs are increasing. Three economic justice advocacy groups and one economist (American Economic Liberties Project, Groundwork Collaborative, the Institute for Local Self Reliance, and Professor Hal Singer) submitted comments suggesting that market concentration and large mega-corporations are a key driver of price gouging. Law Professor Luke Herrine submitted a comment concerning the fair price logic underpinning price gouging laws. Law Professor Ramsi Woodcock submitted a comment concerning the economic logic of price gouging laws. The Consumer Brand Association requested clarity defining “unfair leverage” and other terms it argued were susceptible to different interpretations, and a recognition of causes of inflation that, it asserted, may not be price gouging. The American Trucking Associates and Leading Age submitted comments particular to their industries.

The comments, along with the OAG’s forty-three years of experience in enforcing the statute, informed the proposed rulemaking.

Statutory History

New York passed GBL 396-r, the first anti-price gouging statute of its kind in the nation, in 1979. GBL 396-r was enacted in response to price spikes following heating oil shortages in the

¹ For the sake of readability, the word “disruption” is occasionally used in place of “abnormal market disruption;” all usages of that term in this Notice should be understood to refer to “abnormal market disruption” as that term is defined in GBL 396-r(2).

² Public Comments in Response to the Advanced Notice of Proposed Rulemaking, <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>

winter of 1978–1979.³ The legislature imposed civil penalties on merchants charging unconscionably excessive prices for essential goods during an abnormal disruption of the market. It established that a prima facie case of price gouging was shown where, during a disruption, there was either (1) a gross disparity between a selling price and a pre-disruption price, or (2) a selling price that grossly exceeded the price of other similar goods. The legislature stated that the goal of GBL 396-r was to prevent merchants from taking unfair advantage of consumers and to ensure that during disruptions consumers could access goods and services vital and necessary for their health, safety, and welfare.

Price gouging during disasters and other market disruptions continued to be a major problem for New Yorkers, and the legislature has amended the statute four times since its passage, a sign of its salience for the public. In 1995, the statute was amended to include repairs for the vital and necessary goods covered by the statute and to increase the maximum fine.⁴ In 1998, the law was updated in several significant ways.⁵ First, it was rewritten to explicitly cover every party in the supply chain for necessary goods and services. Second, the legislature added military action as one of the enumerated examples of an abnormal market disruption. The amendment sponsor’s memorandum explained that the amendments were needed because the pricing activities of oil producers in the wake of the Iraqi invasion of Kuwait and the Exxon Valdez oil spill were not clearly covered.⁶ Third, the legislature relieved the Attorney General of the burden to show absence of cost justification to prove a prima facie case, and shifted to the defendant the burden of showing cost justification as a defense to the Attorney General’s prima facie case.

The final major amendment made in 1998 clarified that a price could be unconscionable, and therefore violate the statute, even without a numerically significant price increase.⁷ While the

³ L. 1979, ch. 730 §1, eff. Nov 5, 1979.

⁴ 1995 N.Y. Sess. Laws Ch. 400 (McKinney) (S. 2664, enacted Aug. 2, 1995).

⁵ 1998 N.Y. Sess. Law Ch. 510 (McKinney) (A. 1357-A, enacted July 29, 1998).

⁶ Sponsor’s Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

⁷ The legislature explicitly adopted and incorporated the language of the 1988 price gouging decision by the Court of Appeals, *People v. Two Wheel Corp.*, 71 N.Y.2d 693 (1988). That case involved the sale of approximately 100 electrical generators during a market disruption. The price increases over the pre-disruption price varied widely. Five of the 100 sales included price increases above 50%, two-thirds were greater than 10%, and the rest were less than 10% (including some under 5%). To put it another way: one out of three price increases was less than 10%. The appellants argued that the price gouging statute did not cover the lower price increases. The Court of Appeals rejected the argument and held that:

Respondents’ argument places undue emphasis on the “gross disparity” language of subdivision (3), treating it as a definition of price gouging. But the provision is procedural rather than definitional; it simply establishes a means of providing presumptive evidence that the merchant has engaged in price gouging. A showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness.

initial statute had included only a definition of what constituted a prima facie case, and not a mechanism for proving price gouging outside the prima facie case, the 1998 amendments fixed that. The amendment added a section defining unconscionably excessive pricing as including “unconscionably extreme” prices, those that were set through the “exercise of unfair leverage or unconscionable means”, and prices set by a combination of both unconscionably extreme pricing and unfair leverage.

The law was amended again in 2008, increasing penalties.⁸

In 2020, the law was amended again, after thousands of price gouging complaints were made to the Attorney General during the early days of the COVID-19 market disruption.⁹ The legislature expanded the scope of the statute to explicitly cover medical supplies and services as well as sales to hospitals and governmental agencies. The 2020 amendments also expanded the scope of potentially harmed parties through the statute, replacing consumer with the public in several instances. Finally, these amendments gave the Attorney General the rulemaking authority she is exercising here to effectuate and enforce the statute.

The Attorney General has extensive expertise in administering the price gouging law. The office has been the agency responsible for administering and enforcing this statute for 43 years. In 2011, the Attorney General conducted a statewide investigation leading to a major report examining gasoline prices.¹⁰ The office regularly issues guidance¹¹ regarding price gouging and provides technical advice to the legislature when amendments to the law are proposed. The Attorney General has also engaged in multiple enforcement actions. Over the last four decades, the office has received and processed thousands of price gouging complaints, sent thousands of

Id. at 698. The Court explained that “the term ‘unconscionably excessive’ does not limit the statute’s prohibition to ‘extremely large price increases.’” Where price increases are “attributable solely to their use of the bargaining advantage created by the natural disaster” the appellant can be liable, without reference to the size of the increase. In summation, *Two Wheel* held: that “a price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors.” *Id.* at 699.

⁸ 2008 N.Y. Sess. Laws Ch. 224 (McKinney) (S. 1547, enacted July 7, 2008).

⁹ 2020 N.Y. Sess. Laws Ch. 90 (McKinney) (S. 8189, enacted June 6, 2020).

¹⁰ Office of the Attorney General, Report on New York Gasoline Prices (December 11, 2011), https://ag.ny.gov/sites/default/files/pdfs/bureaus/consumer_fraud/REPORT-ON-NEW-YORK-GASOLINE-PRICES.pdf

¹¹ See, e.g., Press Release, *Consumer Alert: Attorney General James Warns Against Price Gouging During Winter Storm* (Dec. 23, 2022) <https://ag.ny.gov/press-release/2022/consumer-alert-attorney-general-james-warns-against-price-gouging-during-winter>; Press Release, *Consumer Alert: Attorney General James Warns about Price Gouging in Aftermath of Hurricane Henri* (Aug. 23, 2021), <https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-warns-about-price-gouging-aftermath>; Press Release, *Consumer Alert: Attorney General James Issues Warnings to More than 30 Retailers to Stop Overcharging for Baby Formula* (May 27, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-issues-warnings-more-30-retailers-stop-overcharging-baby>.

cease-and-desist letters, negotiated settlements, and worked with retailers and advocacy groups to ensure that New Yorkers are protected from price gouging.¹²

Current Statutory Terms

The current language of GBL 396-r(2) provides as follows:

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.

Covered goods and services include three categories: (1) consumer goods and services, (2) essential medical supplies and services, and (3) other essential goods “used to promote the health or welfare of the public.”¹³

In subsection 3(a), the statute lays out the factors a court must consider in determining whether price-gouging has occurred. Price-gouging may have occurred where “the amount of the excess in price is unconscionably extreme” or where the price was set through “an exercise of unfair leverage or unconscionable means,”¹⁴ or a combination of those two factors.

In subsection 3(b), the statute states that the Attorney General can establish prima facie proof of price-gouging in two ways. First, the Attorney General may produce evidence establishing “a gross disparity” between the price at which a good or service was sold and “the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market.”¹⁵ Second, the Attorney General may produce evidence establishing that the price “grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area.”¹⁶

A prima facie case can be rebutted by the defendant seller by showing that the price increase “preserves the margin of profit” that the defendant received prior to the disruption, or that the

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

¹³ *Id.*

¹⁴ *Id.* § 396-r(3)(a).

¹⁵ *Id.* § 396-r(3)(b)(i).

¹⁶ *Id.* § 396-r(3)(b)(ii).

defendant incurred “additional costs” not within its control. These defenses only apply to the margins and costs of the specific goods and services for which a prima facie case exists.¹⁷ The price gouging law applies during an “abnormal disruption of the market,” defined as “any change in the market, whether actual or imminently threatened, resulting from” two sets of enumerated events: (1) “stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency”; or (2) when the Governor declares a disruption-related state of emergency.¹⁸

Economic and Policy Framework

The price gouging statute represents a decision by the people of New York, via the legislature, to protect against the unique harms that can result from price increases for vital and necessary goods during an emergency or market disruption, and a choice to balance values differently during an abnormal market disruption than during a normal economic period. The New York legislature decided that the imbalances of power that either result from, or are exacerbated by, an abnormal market disruption should not lead to either deprivations of vital and necessary services, on the one hand, or windfalls, on the other.¹⁹

An abnormal market disruption is characterized by an abnormal increase in demand or a decrease in supply (or both) of a vital or necessary good or service. It gives existing sellers the power to raise prices on the products they already have in their inventory. If, for example, the local electricity grid goes down, the sellers will raise the price of generators (in the absence of a price gouging rule) because of increased demand for the existing supply. If a heavy snowstorm shuts down the highways for days, the cost of orange juice to sellers will shoot up because of constricted supply. In economic terms, an abnormal market disruption is characterized by short term demand that cannot be met by short term supply.

The risk of firms taking advantage of an abnormal disruption may be greater where certain market characteristics reduce the likelihood of new entry—for example, where supply chains are disrupted or key inputs are scarce, or where high concentration makes investment less attractive in a particular market.²⁰ In these circumstances, entering a market or scaling up production may require upfront investments that may not be profitable depending on the long-term market

¹⁷ *Id.* § 396-r(3)(c).

¹⁸ *Id.* § 396-r(2); *People v. Quality King Distributors, Inc.*, 209 A.D.3d 62 (1st Dep’t 2022).

¹⁹ For a comment discussing how New York’s law fits within fair price and just price logic generally, see Professor Luke Herrine, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 14, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>

²⁰ See, e.g., Jonathan Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 11 (summarizing economic evidence that entry by new competitors will not correct instances of durable market power); JONATHAN BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 83 (2019) (noting that “[t]heoretical literature agrees that the exercise of monopoly power need not be transitory or corrected by new rivals attracted by supracompetitive prices”); Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting*, 5 J. COMPETITION L. & ECON. 249, 255 (2009).

outlook.²¹ Incumbents are insulated from the credible threat of new competition to discipline prices during abnormal market disruptions.²² In such cases, there is little risk of shortages from limiting disruption-created windfalls. The New York price gouging statute reflects a judgment by the New York legislature that any such risks are outweighed by the benefits of protecting New Yorkers.²³

The price gouging law protects the most vulnerable people. Poor and working-class New Yorkers are the most likely to be harmed by price increases in essential items and the least likely to have savings or disposable income to cover crises. The law ensures that market disruptions do not cause vital and necessary services to be rationed based on ability to pay. When there is a risk of New Yorkers being priced out of the markets for food, water, fuel, transportation, medical goods, and other essentials like diapers, soap, or school supplies, the stakes are especially high. The law addresses the urgency created by this risk by putting limitations on the degree to which participants can set prices by reference to supply and demand with market rules that operate differently than during a non-disruptive period.

The price gouging law is also important because an abnormal market disruption can serve as a pretext for companies to raise prices under the guise of increased costs or an economy-wide inflation. During a market disruption that might be upending their lives more broadly, consumers

²¹ For example, many economic analysts have argued that that oil and gas companies are limiting investment in new exploration and drilling or in scaling up refinement capacity despite significantly higher short-term prices in part because of concerns about the long-term profitability of those investments. Kevin Crowley & Laura Hurst, *Big Oil Spends on Investors, Not Output, Prolonging Crude Crunch*, BLOOMBERG (May 7, 2022), <https://www.bloomberg.com/news/articles/2022-05-07/big-oil-spends-on-investors-not-output-prolonging-crude-crunch>; Goldman Sachs, *Why Oil Prices Are Surging but Investment is Drying Up*, BRIEFINGS (Jan. 20, 2022), <https://www.goldmansachs.com/insights/pages/from-briefings-20-january-2022.html>; Evan Halper, *Oil refineries are making a windfall. Why do they keep closing?*, WASH. POST (June 20, 2022), <https://www.washingtonpost.com/business/2022/06/20/refineries-profit-gas-prices/>; Christopher Helman, *As ConocoPhillips Spins Off Refining Assets, Think Twice Before Buying The New Phillips 66*, FORBES (Apr. 30, 2012), <https://www.forbes.com/sites/christopherhelman/2012/04/30/as-conocophillips-spins-off-refining-assets-should-you-own-the-new-phillips-66/?sh=69ea68084eb7>.

²² For research showing that high prices during a disruption will not successfully lead to new investment or supply increases, see, e.g., San Sau Fung & Simon Roberts, *Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*, 12 J. EUR. COMPETITION L. & PRAC. 734, 737 n.16 (2021) (“If demand is actually expected to fall right back [such as for toilet paper and food] then suppliers will not expect higher future prices and there is no incentive to increase supply, regardless of the short-term price spike. It also means current market capacity—without relying on high prices to provide an incentive for expansion—is sufficient to satisfy demand once panic buying is over.”)

²³ See MIKE KONCZAL & NIKO LUSIANI, ROOSEVELT INST., PRICES, PROFITS, AND POWER: AN ANALYSIS OF 2021 FIRM-LEVEL MARKUPS 1 (2022) (“Since markups are unusually and suddenly so high, there is room for reversing them with little economic harm and likely societal benefit, including lower prices in the short term, and less inequality and potentially more innovation in the medium term.”). That said, many economists are highly skeptical of price gouging laws. Price Gouging Poll, CHICAGO BOOTH INITIATIVE ON GLOB. MKTS, <https://www.igmchicago.org/surveys/price-gouging-2/> (finding a plurality of responding economists believe price gouging laws would not serve the U.S. economy). The statute passed by the New York legislature, however, reflects the view that the ostensible risks that raise concerns for these economists are outweighed by the countervailing economic and ethical logic supporting limits on windfall profits in certain limited circumstances. The job of the Attorney General is to lay out that logic and to propound clear rules for the application of that statute consistent with the legislature’s intent.

lack the information and ability to evaluate whether such increases are pretextual. Thus, a disruption reduces the price sensitivity of consumers, patients, and governments, who become desperate to get access to vital and necessary goods. That desperation leads them to be willing to pay more, allowing sellers to generate pure profit that does not come from superior business acumen, insightful planning, or efficient risk-taking. Accordingly, the law limits the ability of a firm to maximally profit from a supply-demand mismatch or from the panic and confusion that often accompany disruptions.

Finally, by preventing a disruption from triggering a broader economic downturn and exacerbating individual suffering, the price gouging law also serves the goal of economic stability. It serves to counteract inflationary tendencies.²⁴ When prices increase for non-cost-based reasons, they contribute to inflation, which in turn encourages companies to impose further increase prices, which in turn contributes to more inflation. Not only do spiraling price increases harm the most vulnerable, they also lead to additional disruptions and a less stable economy. The economic costs of companies using abnormal disruptions to justify charging higher prices can be significant and long-lasting.

This background informed the rulemaking, along with the following three additional considerations:

First, the heart of the statute is a prohibition on firms taking advantage of an abnormal market disruption to unfairly *increase* their per-unit profit margins. Firms are allowed to *maintain* prior profit margins during an abnormal market disruption, and even increase total profit by increasing production and thus sales. 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. 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.

Second, the proposed rules are designed to help detect and enforce upstream price gouging, and not merely the retail-level price gouging that may be more noticeable to consumers. New York's retail sector includes over 77,000 businesses that employ nearly one million workers. They are a key driver of economic health and central to communities around the state as employers, providers of key goods, and participants in local affairs. Retail establishments are also a key tax base. Many retailers provide necessary goods, during, before, and after, market disruptions. Despite this, as the point of contact for most consumers, retailers are the most likely to get blamed when prices increase due to an abnormal market disruption, even if they are just trying to themselves stay afloat after being the victims of upstream price gouging. By aiding enforcement efforts against upstream firms, and by clarifying that retailers themselves are not liable for merely passing on upstream costs imposed on them, the OAG expects that New York's small businesses will benefit from the guidance provided by these rules.

²⁴ Professor Luke Herrine, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 14, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf> (“[I]ntervening to prevent opportunistic increases in profit margins can be a way to dampen inflationary dynamics. If firms are taking advantage of unhinged price expectations to increase their own prices, that can create a profit-price spiral or “profit-push inflation”, in Gardiner Means’s terminology.”).

Third, the OAG was informed by comments by the Groundwork Collaborative, the American Economic Liberties Project, the Institute for Local Self Reliance, and Professor Hal Singer to the advanced notice of proposed rulemaking that identified multiple ways in which corporate concentration can encourage price gouging. Corporate concentration can exacerbate the effect of demand or supply shocks caused by an unexpected event, and firms in more concentrated markets may be more willing to exploit the pricing opportunity that a disruption offers. Big actors in concentrated markets already have more pricing power than small actors, and a market shock can amplify that pricing power. In a concentrated market, participants may be more accustomed to engaging in parallel pricing and preserving market share than in less concentrated markets, where firms compete more vigorously. Most importantly, it may be easier for big actors to coordinate price hikes during an inflationary period, even without direct communication between them.²⁵

Rule 1

Proposed Action: Add New Part 500 to Title 13 NYCRR

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

Subject: Price Gouging

Purpose: create a presumption of gross disparity for price increases over 10%

Text of proposed rule:

500.1 Presumptive Cases of Gross Disparity

It shall be a presumptive case of a gross disparity in price if the price increase for any covered good or service was greater than 10% of 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.

Regulatory Impact Statement

1. Statutory authority: Subdivision 5 of the price gouging statute, GBL 396-r(5), authorizes the Attorney General to promulgate rules and regulations to effectuate and enforce the price gouging statute.

2. Legislative objectives: The primary objective of the statutory authority is to protect the public from firms profiteering off market disruptions by increasing prices and to deter violations.

²⁵ Hal Singer, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf> (“It is easier to coordinate with three rivals in an oligopoly than with thirty in a competitive industry . . . Inflation [allows firms to coordinate on prices] by giving firms a target to hit—for example, if general inflation is seven percent, we should raise our prices by seven percent. Inflation basically provides a ‘focal point’ that allows firms to figure out how to raise prices on consumers without communicating.”).

The objectives of the rules are to: (a) ensure the public, business, and enforcers have guideposts of behavior that constitutes price gouging; (b) ensure enforcers have the information necessary to enforce the price gouging statute; (c) clarify the grounds for the affirmative defense in a prima facie case.

The Attorney General has concluded that the proposed rules are necessary because they are the most effective means available to educate the public as to what constitutes price-gouging, to deter future price gouging, to protect New Yorkers from profiteering, and to effectuate the legislature's goals.

3. Needs and benefits: The price gouging statute is designed to ensure that market disruptions are not exploited to increase profits at the expense of vulnerable New Yorkers seeking vital and necessary goods. The Attorney General chose to create a presumption that an increase in price of greater than 10% constitutes a gross disparity for the following reasons.

First, a greater-than-10% price increase as the measure of what constitutes presumptive price gouging (“the 10% rule”) is the most commonly employed measurement around the country. In attempting to determine what the societal understanding of what a gross disparity might presumptively be, the office canvassed other states to understand how price gouging laws work in those states. Six states or districts—Connecticut,²⁶ Georgia,²⁷ Hawaii,²⁸ Louisiana,²⁹ Mississippi,³⁰ and Washington D.C.³¹—use what is effectively a 0% threshold: any non-cost justified price increase of a vital and necessary good constitutes price gouging. This doesn't put businesses in a worse-off position than prior to the disruption (i.e., they can continue to make a profit), but it forbids them from taking any advantage of the situation for covered goods by increasing their profit margins. The 10% rule is most widely used, both as a matter of population covered and as a matter of the number of jurisdictions that use it. Alaska,³² Arkansas,³³

²⁶ Conn Gen. Stat. § 42-230 (2019).

²⁷ Ga. Code §10-1-393.4 (2018).

²⁸ Haw. Rev. Stat. § 127A-30 (2019).

²⁹ La. Rev. Stat. Ann. §29.732 (2017).

³⁰ Miss. Code Ann. §75-24-25.

³¹ D.C. Code Ann. § 28-4101 et seq.

³² Alaska SB 241, Section 26.

³³ AR Code § 4-88-303.

California,³⁴ Delaware,³⁵ Kentucky,³⁶ Maryland,³⁷ New Jersey,³⁸ Oklahoma,³⁹ Utah,⁴⁰ and West Virginia⁴¹ all use 10%. New York City also uses a 10% threshold.⁴² Three states—Maine,⁴³ Oregon,⁴⁴ and Wisconsin⁴⁵—use a 15% threshold. Three states—Michigan,⁴⁶ Minnesota,⁴⁷ and Pennsylvania⁴⁸—use a 20% threshold. Two states—Alabama⁴⁹ and Kansas⁵⁰—use a 25% threshold. Nineteen states apply no numerical presumption, and instead peg price gouging to unconscionably extreme prices or similar formulations. While our laws are not constrained by those of other states, the fact that the average and most common percentage increase is 10%, and that New York City also has a 10% rule, is evidence of a societal convergence around the illegitimacy of more than 10% price increases.

Second, the 10% rule is easily administrable.⁵¹ Businesses and consumers who see such an increase during an abnormal market disruption will be able to alert the Attorney General of a presumptive case. Also for administrability reasons, there is a value in the New York state statutory presumptive threshold being the same as the threshold applied in both New York City and New Jersey. A uniform 10% rule throughout New York State will provide an easy benchmark for judges and avoid potential cross-border price cliffs (e.g., pricing not subject to regulatory guidance in Westchester County, but a 10% rule in the Bronx).

Third, setting a numerical percentage as guidance is important for tens of thousands of small retailers who are an important part of communities throughout the state. Small retailers are often perceived as being responsible for driving price increases, but may, in fact, be themselves

³⁴ Cal. Penal Code § 396(b) (determining that 10% price increases are excessive and unjustified increases.”).

³⁵ Del. Declaration of a State of Emergency (2020) § 9.

³⁶ Ky. Rev. Stat. §367.374(1)(b) (2021).

³⁷ 2020 Md. Laws ch. 14.

³⁸ N.J. Rev. Stat. § 56:8-108.

³⁹ 15 Okla. Stat. § 15-777.4.

⁴⁰ Utah Code Ann. §13-41-101 (2018).

⁴¹ W. Va. Code §46A-6J-3.

⁴² The Rules of the City of New York, § 5-42 (effective June 26, 2020).

⁴³ Me. Rev. Stat. Ann. tit. 10, § 1105 (2011).

⁴⁴ Or. Rev. Stat. §401.965 (2009).

⁴⁵ Wis. Stat. §100.305 (2019).

⁴⁶ Mich. Comp. Laws §445.903(z); Michigan Executive Order No. 2020-18.

⁴⁷ Minnesota Emergency Executive Order 20-10.

⁴⁸ Penn. P.L. 1210, No. 133 §4 (2006).

⁴⁹ Ala. Code § 8-31-1 et seq.

⁵⁰ Kan. Stat. Ann. §50-6.106(a) (2017).

⁵¹ American Economic Liberties Project, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

victims of price gouging. They are significant employers, and in many areas the only sellers of essential goods and services. In response to the Advance Notice of Proposed Rulemaking, the New York Association of Convenience Stores, representing 8,000 minimarts and convenience stores, submitted a comment urging the Attorney General to set forth numerical guidance in this rulemaking.⁵²

Fourth, even for small dollar goods and services, price gouging above the proposed greater-than-10% threshold has a meaningful effect. Costs add up, particularly for poor individuals and families. For example, \$0.15 more for a \$1.50 can of beans may seem *de minimis*, but could lead a large family to spend several dollars more per month.⁵³ That can further add up to significant dollar values across every vital and necessary good and service, from cooking oil, to bread, to gasoline. For most vital and necessary goods, like food, gas, and medical care, any increase in costs can create a significant burden, and a 10% increase that is not justified by costs represents precisely the form of unconscionability the statute was designed to address.

The rule merely creates a presumption, and an increase less than a 10% price increase may constitute price gouging due to unfair leverage or excessive pricing due to the absolute price increase depending on other facts and market circumstances. Proposed Rule 5 addresses some of those circumstances.

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

⁵² New York Association of Convenience Stores, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

⁵³ Many poor New Yorkers purchase gas in \$5 or \$10 increments for cash flow reasons, so their increased gas bill might be only \$0.50 or \$1. However, the key is the percentage, not the nominal dollar increase.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered alternatives to the proposed regulations.

The Attorney General considered taking no action. However, for the reasons given above, a guideline seemed prudent.

The Attorney General also considered setting the percentage increase at which a gross disparity in pricing would be presumed at a higher percentage than 10%. She chose not to set a higher percentage primarily because such a percentage would represent a greater redistribution from consumers to firms exercising the pricing power created by an abnormal market disruption. Moreover, a seller can continue to earn at least the same profit margin per good or service as prior to the disruption. Therefore, any price increase above and beyond that justified by cost—and certainly one that is greater than 10% above prior prices plus increased costs—takes advantage of the pricing power created by an abnormal market disruption to create a windfall for the seller.

The Attorney General also considered including a *de minimis* nominal dollar increase defense, such as one that allowed for small price increases (pennies) that might nonetheless be greater than 10%. She concluded that such a defense was not part of the statutory purpose, and the Court of Appeals in *People v. Two Wheel* rejected a *de minimis* defense.⁵⁴ Moreover, such a rule might even lead to a regressive law that leaves poorer New Yorkers, who might purchase products in smaller, cheaper, packs, less protected than wealthy ones. While wealthy New Yorkers may be able to stockpile essentials when prices are lower, poor New Yorkers have to follow the price of the day for bread, meat, and toiletries. The poorest New Yorkers, whom the statute is designed to protect, would be subject to exploitative pricing while wealthier New Yorkers could avoid the injury. For instance, the average pre-tax income in Clinton County is roughly \$29,960 per year, corresponding to a little over \$2,500 a month or \$575 a week.⁵⁵ This level of income does not leave a lot of room for increases for essentials. Since price gouging may happen in multiple industries at once that are simultaneously in periods of abnormal market disruption (e.g., cell phone service, internet provider, gasoline, bread, meat, toiletries) a *de minimis* defense would allow firms to point at the small impact of their particular good or service, which could frustrate one of the key objectives of the statute.

Finally, the Attorney General considered setting 0% threshold (i.e., a presumption that any price increase not justified by costs was a gross disparity). As noted above, six jurisdictions already take essentially this approach. In addition, one of the comments received by the Attorney General argued that, because a price increase represents a transfer of wealth from the consumer

⁵⁴ *People v. Two Wheel Corp.*, 71 N.Y.2d 693 (1988).

⁵⁵ U.S. Census Bureau, *2016-2020 American Community Survey 5-year Estimates Data Profiles* (June 15, 2022), <https://www.census.gov/quickfacts/fact/table/clintoncountynewyork/INC910220>.

to the firm increasing the price, any price increase during a market disruption above the increase in cost should be considered unconscionably extreme. Professor Ramsi Woodcock argued:

[T]he requirement of “unconscionably excessive” pricing should be interpreted broadly to include all above-cost pricing. That is, all economic rents should be treated as the product of “unconscionably excessive” pricing. The reason is that all economic rent represents a pure redistribution of wealth from consumers to firms, one that is unnecessary to create an incentive for firms to produce.⁵⁶

The Attorney General chose a 10% rule for the reasons outlined above, but the 10% rule proposed here does not foreclose the possibility that a lower price increase might be unconscionably extreme depending on the context. For instance, there are necessary and expensive goods where a small percentage would mean a large overall cost to the consumer.

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

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 2

Proposed Action: Add New Part 500.2 to Title 13 NYCRR

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

⁵⁶ Professor Ramsi Woodcock, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

Subject: Price Gouging

Purpose: Give guidance around what does and does not constitute a “cost” for purposes of an affirmative defense, give guidance on the time period over which cost and price increases should be calculated, and clarify that the use of an index or other external indicator in a contract to set prices is not a defense to price gouging.

Text of proposed rule:

500.2 Costs not within the control of the defendant

1. *The phrase “Additional costs not within the control of the defendant” whether used in the statutory language or regulations, includes only actually incurred costs directly attributable to the production, purchase, storage, distribution, taxation, labor, and sale of the specific good or service, and a directly attributable percentage of the overhead costs of the business, including energy, rent, or general operational budgets.*
2. *The phrase “Additional costs not within the control of the defendant,” whether used in the statutory language or in regulations, does not include a decline in sales of other goods and services, costs related to past debts or expenses, projected future costs, internal charges levied from one part of a seller to another part of a seller, or costs related to planned or speculative future expenditures, including new investments or research and development, not related to the actual production, purchase, storage, distribution, labor and sale of the specific good or service.*
3. *Costs shall be calculated over the same time period as the time period of the market disruption.*
4. *The existence of a customary or industry practice of employing an external index for pricing shall not establish that a seller’s charging of that index price is a cost-based price.*

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits: The statute reaches every party in the supply chain for vital and necessary goods and services. In response to the Advance Notice of Proposed Rulemaking, the Attorney General received comments highlighting the increased costs that retailers have faced. The National Supermarket Association noted that “when supermarkets are charged higher prices for their products, they ultimately must raise prices when selling to consumers as well.”⁵⁷ The Attorney General recognizes that, as the Consumer Brands Association wrote in its comment to this proposed rulemaking, “[a]ny new legal definitions of and investigations related to price gouging should clearly differentiate between price gouging and price increases related to

⁵⁷ National Supermarket Association, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Mar. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

inflation and economic conditions.”⁵⁸ These rules provide guideposts for compliance. Clarity for wholesalers, producers, retailers, and suppliers is necessary to deter illegality. Clarity for small businesses—who account for 62% of job growth and 44% of economic activity—is necessary for compliance and to help businesses realize when they are subjected.⁵⁹ Guidelines on evaluating the affirmative defense of increased costs (e.g., what can be included in financial metrics) can aid businesses in calculating what is illegal profiteering.

Cost is not a technical term, and firms may use different internal accounting systems. In the context of the cost defense to a prima facie case in price gouging statute, the legislative purpose is clear that cost should be interpreted narrowly. Costs are described as “additional,” implicating only those costs that arose after the market disruption. Costs include only those which are “for” the “goods and services” whose price increased, not for the business as a whole. The product-specific losses accrued during a market disruption must be costs specific to the product whose price was increased; losses on sales of a business’s other products may not be included in the cost-justification calculation.

The statute limits a cost defense to those costs “not within the control of the defendant,” necessarily excluding discretionary capital expenditures or discharge of pre-disruption existing debts. To underline that point, the word “imposed” is used, again limiting costs to those where the defendant had no choice but to incur additional costs. This rule addresses common accounting practices that may be sensible for purposes unrelated to this rule but should not be used to define costs for purposes of an affirmative defense to New York’s price gouging statute. For some firms, and in many instances, companies might consider capital expenditures or R&D a “cost.” Because they are within the control of the defendant, however, they are not a cost for purposes of an affirmative defense.

Another example is transfer pricing. Transfer pricing is an accounting practice whereby one division in a firm charges another division for goods and services using an internally-set price (sometimes derived from generally-accepted accounting practices). Internal accounting mechanisms may treat transfer prices as costs for internal accounting purposes, but such treatment is an abstraction that does not necessarily capture the costs outside the control of the firm that it actually incurred in producing the good or service. Thus, the statute would treat the “costs” represented by payment of transfer prices as “within the control” instead of “outside the control” of the party, and those costs therefore do not provide a defense under the statute.

For some vital and necessary goods, including many commodities, there is a common industry practice of setting prices based on indices. A price index is a composite number designed to reflect the average value of a set of individual prices. In some cases, two business entities use the index in an on-going supply contract. In others, they use the index as a benchmark to form a one-off price. These customary uses of index prices can confuse firms into thinking that they are not

⁵⁸ Consumer Brands Association, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 15, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

⁵⁹ Martin Rowinski, *How Small Businesses Drive The American Economy*, Forbes (Mar. 25, 2022) <https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/25/how-small-businesses-drive-the-american-economy/?sh=186d7c094169>.

“setting” prices, because they use an external indicator, and therefore regard their pricing choices as outside the scope of 396-r. However, an increased index price does not necessarily indicate increased costs; it may merely indicate a supply crunch or demand spike. Index prices, at their best, reflect other firms’ prices, and as such are not useful tools for assessing price gouging by an individual firm. A firm that buys at an inflated index price can correctly count that purchase as an increased cost. However, a firm that chooses to sell at an index price cannot use the mere existence of the index as a defense. In fact, because indices make it easier for firms to converge on higher prices, there are increased risks of price gouging when prices are pegged to indices. When numerous market participants increase their prices contemporaneously, consumers are prone to blame inflation rather than individual companies’ pricing decisions. One example is the egg industry—an industry that has been the subject of prior price gouging enforcement by the Office.⁶⁰ Most egg producers peg their egg prices to indices that are based in part on subjective “market assessments.” Thus, egg prices are determined using a “feedback loop” where: (i) egg producers communicate their “assessment” of egg prices; (ii) these assessments are used to create price indices and are sent to the producers; and (iii) the egg producers sell their eggs at prices based on the indices. Economic theory says that prices in a competitive market are set at marginal cost. Yet this index-based methodology is not necessarily tied to costs and, thus, it creates room for egg producers to converge upon higher prices even in the absence of cost increases.⁶¹

To avoid ambiguity, this guidance clarifies that index prices are *not* external objective measures of the “right” price, and as such reliance on them is no more evidence of a legal price increase than would be a defense that relied on the existence of a price set by another company engaged in price gouging.

This regulation also clarifies that costs accruing after the abnormal disruption has begun can be used as a defense under the statute. Most abnormal disruptions will be short, but as the experience of the pandemic has illustrated, some may last for a long time. These may lead firms to question which costs within the same calendar or fiscal year may be included among the costs relevant for price gouging. The rule clarifies that costs incurred prior to the abnormal disruption cannot be used as a defense for price gouging. On the other hand, if there is a disruption followed by an immediate cost increase first, which a seller attempts to recoup by imposing a price increase some time later, the seller may use the pre-price-increase (but post-disruption) costs to justify the subsequent price increases, as those costs cut into its margin for the pre-price-increase sales. In the case of a lengthy abnormal market disruption, the costs incurred to acquire or produce a good or service may first increase, then decrease. The product-specific losses accrued during an abnormal market disruption are costs specific to that product.

⁶⁰ See Verified Petition, *People v. Hillandale Farms Corp.*, https://ag.ny.gov/sites/default/files/petition_1.pdf.

⁶¹ In a comment to this proposed rulemaking, United Egg Producers argued that “[i]n no way do egg producers have control over the market quote Urner Berry [the egg industry’s leading index] publishes.” UEP agrees, though, that such indices are tied to market assessments rather than costs and may instead reflect “supply/demand factors.” For this reason, regardless of whether egg producers are able to manipulate indices, the choice to use an index price cannot be a defense against a claim of price gouging. See United Egg Producers, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

By way of example, this rule means that a rent increase in an apartment complex several months into an abnormal disruption may be justified by lost revenue for that apartment complex earlier in the market disruption. While such a rent increase would not be justified by attempting to recoup pre-disruption costs, the total “costs not within the control of the defendant” would include all the costs related to maintaining that apartment during the disruption.

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action but concluded that there was a broad need for guidance especially for regulated parties.

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

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding

the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 3

Proposed Action: Add New Part 500.3 to Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Clarify that vital products and services includes those that are introduced in the market after the event causing the market disruption; allow the use of margins for comparable goods and services to evaluate pricing for products and services that are created after the event causing the market disruption.

Text of proposed rule:

500.4 New Products

- 1. The fact that the product or industry did not exist prior to the abnormal market disruption is not a defense under the price gouging statute.*
- 2. Profit margins for a new product that are higher in percentage terms than a comparable product may be used as evidence of unconscionably extreme pricing.*

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits:

During the ongoing COVID-19 pandemic, the Office of the Attorney General received many complaints about price gouging on goods and services introduced in response to needs created by the pandemic, such as COVID-19 at-home tests, vaccinations, and medical treatments. Future crises also may result in price gouging on novel products or services. The legislature, facing price gouging complaints related to medical supplies, some of which were being developed directly in response to the pandemic, indicated that it wanted medical supplies covered by the

statute. As recent experience has shown, medical supplies in particular may be created in direct response to particular health crises.⁶²

One of the challenges of evaluating price gouging in the case of a *new* product is that a straightforward comparison of pre- and post-disruption pricing is not possible. The margin rule specifies that margins of existing similar products—in percentage terms—may be used as evidence of price gouging in the case of new products. Put another way, a new product sale can be unconscionably extreme if the baseline profit margin is higher than the profit margin of a similar product. These rules clarify how the New York price gouging statute protects vulnerable New Yorkers from profiteering by companies making new products, and new companies taking unfair advantage of an abnormal market disruption.

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

⁶² NY Assembly Debate on Assembly Bill A10270, May 27, 2020, at 17 (“This legislation would update New York’s statute regarding the price gouging of consumer goods by expanding it to cover essential medical supplies and services and other goods or supplies and services used to promote the health and welfare of the public. During the COVID-19 pandemic we’ve seen countless instances of egregious price gouging; hand sanitizer, face masks, bandages, . . . medical-grade apparel and other crucial medical supplies that are desperately needed by our frontline workers, hospitals and other healthcare facilities.”); NY Senate Debate on Senate Bill S8189, May 27, 2020, at 1575 (“[The amendment] will ban price gouging on essential medical supplies and service[s]. It will ban price gouging against hospitals, healthcare providers, and state and local governments.”); Sponsor’s Mem., Bill Jacket, L. 2020, ch. 90 (“These examples [of pandemic price-gouging] have illustrated ways to strengthen our existing price gouging statute, namely by broadening its application to any goods and services vital for the health, safety, and welfare of the general public, specifically applying it to medical supplies and services used to treat, cure, or prevent disease or illness.”).

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action, but given the consumer and industry confusion about baselines for price gouging for new products, she believes action that creates clarity for consumers and market participants is important.

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

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 4

Proposed Action: Add New Part 500.4 to Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Clarify circumstances that could constitute unfair leverage

Text of proposed rule:

500.4 Presumptive Cases of Unfair Leverage

“Unfair leverage or unconscionable means,” as referred to in 396-r(a)(2), includes but is not limited to the use of unequal bargaining power, high-pressure sales techniques, confusing or hidden language in an agreement or in price setting.

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits: This rule puts firms and customers on notice of some of the conduct that constitutes unfair leverage, by giving examples that come from the judicial history. This kind of behavior is also understood in New York law to constitute procedural unconscionability.⁶³

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action, but because of the evidence that New Yorkers were being harmed by large firms and firms in concentrated markets taking advantage of market disruptions, concluded that action was prudent.

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

⁶³ *Master Lease Corp. v. Manhattan Limousine, Ltd.*, 177 A.D.2d 85, 89 (2d Dep't 1992).

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 5

Proposed Action: Add to Part 500.5 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Create a presumption of unfair leverage based on thresholds related to annual revenue, market share, and market concentration

Text of proposed rule:

500.5 Unfair Leverage

1. *When unfair leverage is used to increase prices, there is no de minimis percentage price increase to create a presumption of illegality.*
2. *“Unfair leverage,” as referred to in 396-r(3)(a)(ii), will be presumed when a seller with at least 30% market share raises prices. A defendant can rebut such a presumption with the same evidence that a defendant can rebut the prima facie case as laid out in 396-r(3)(c).*
3. *“Unfair leverage” as referred to in 396-r(3)(a)(ii), will be presumed when a significant competitor in a market for vital and necessary goods and services with five or fewer significant competitors raises prices for such goods or services.*
 - a. *A firm with above a 10% market share will be presumed to be a significant competitor.*
 - b. *A defendant can rebut such a presumption with the same evidence that a defendant can rebut the prima facie case as laid out in 396-r(3)(c).*

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits: Firms in concentrated markets pose a special risk of price gouging, because they can use their pricing power in conjunction with an abnormal market disruption to unfairly raise prices. In this rule, the OAG addresses the risk posed by these firms and establishes a 0% threshold for their non-cost-based price increases. The firms covered by these rules are presumed to be price gouging if they raise their prices at all during an abnormal market disruption; they can, of course, rebut the presumption by proving that they maintained the same profit margins as they had before the disruption or that increased costs post-disruption explain their price increases.

Some states create a presumption of price gouging with any price increase for *all* companies. Under these proposed rules, this threshold conforms to those cases where unfair leverage is used; it is well established in New York case law that there is no price increase too small to constitute gouging in the presence of the use of unfair leverage.⁶⁴ A rule that permitted any level of price increase would incentive high market-share companies to set their increases exactly at whatever level was permissible.

In their comment to this rulemaking, the American Economic Liberties Project made this point, writing:

Collusion requires the sharing of some form of information, whether sales volume, pricing plans, costs, plans for capacity increases or restrictions, or direct price increases. For large firms in consolidated industries, those barriers are already low, and by providing an upper limit to those price increases, the OAG would be solving a cartel's coordination problem for it! If the OAG selected 10% as the limit for sellers with leverage, sellers would be able to identically increase their prices by 9%, and credibly claim that their price increases are identical because of the constraints created by the rulemaking, rather than the collusion from which such increases actually stem. The same would go for 8%, 5%, or any other, more lenient standard.⁶⁵

These rules, therefore, establish a presumption of price gouging where leverage and pricing power exist, and coordination or tacit collusion is most likely.⁶⁶

⁶⁴ *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988).

⁶⁵ American Economic Liberties Project, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

⁶⁶ See FALK BRÄUNING, JOSÉ L. FILLAT & GUSTAVO JOAQUIM, FED. RSRV. BANK OF BOS. CURRENT POL'Y PERSPS., COST-PRICE RELATIONSHIPS IN A CONCENTRATED ECONOMY 1, 8 (2022) (finding that the pass-through of cost

This rule covers two scenarios: firms with significant market share, and firms in concentrated industries.

1. Firms with Significant Market Share. The AG proposes that firms with 30% market share should be subject to the unfair leverage rule. These firms, by definition, are responsible for nearly one in three sales in a market and have an outsized role in price setting that is enhanced during an abnormal market disruption. The 30% market share threshold is a conservative metric of pricing power. Smaller competitors would not likely be able to quickly respond to defeat a price increase by a 30% market share holder, even with lower prices. Firms with this level of market share will typically have more stock of available merchandise and may benefit from the preferential treatment given to larger firms by upstream suppliers. The rational profit-maximizing choice for a smaller competitor in an industry with such a seller will often be to match the larger company's price, thus spreading the price increase throughout the market. Moreover, the normal comparison-shopping process that defeats price increases in normal times may be more limited during an abnormal market disruption. In other words, firms with large market shares represent a source of contagion for market wide harm to New Yorkers and should have their efforts to profiteer especially curtailed.

The Attorney General chose 30% because in markets at “equilibrium,” the settled law in the United States has been that 30% market concentration presents a threat of undue concentration.⁶⁷

2. Companies in Concentrated Markets. The Attorney General proposes that firms with five or fewer significant competitors be subject to the unfair leverage rule. It is well-established that a concentrated market tends to lead to higher prices.⁶⁸ Firms with meaningful market share have greater ability to collude or mirror pricing.

shocks into prices is “25 percentage point[s] larger . . . when industries become more concentrated at the rate they have in the United States during our estimation sample of 2005 through 2018” and concluding that “our results suggest that the recent rise in concentration is an amplifying factor for the pass-through of current cost shocks emanating from supply shortages, energy price shocks, and labor market tightness.”). See also Hal Singer, *Antitrust Should Be Used to Fight Inflation*, AM. PROSPECT (Feb. 2, 2022), <https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/> (“The pandemic provides the cover for coordinated pricing. Indeed, general inflation can serve as a pretext for a coordinated price hike.”); Hal Singer, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf> (noting that “the largest bouts of inflation in 2021 tended to occur in the most concentrated industries”).

⁶⁷ See *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 364 (1963) (“Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.”).

⁶⁸ Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK INDUS. ORG. 951 (Richard Schmalensee & Robert D. Willig, eds. 1989); Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2006 (2018). In 2015, John Kwoka published a meta-analysis of post-merger studies to examine the impact on prices of mergers that were approved. Of forty-two mergers studied, thirty-four led to price increases after controlling for other factors. JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES* 110-11 (2015). See also, e.g., Hal Singer, *Antitrust Should Be Used to Fight*

John Kwoka, the Chief Economist to the Federal Trade Commission (“FTC”), conducted an empirical review of consummated mergers.⁶⁹ His research informed this rule-making by showing that mergers resulting in fewer than six significant competitors almost always led to increased prices. He found that “the vast majority of mergers resulting in five or fewer significant competitors . . . have anticompetitive consequences.”⁷⁰ He noted that there is an FTC presumption that a firm with above a 10% market share constitutes a significant competitor.⁷¹ While pricing power that flows from concentration will exist at different levels depending on the industry, and is more likely to exist in industries where there are significant economies of scale and network effects, Kwoka’s research showed that the price impacts existed across the board.

The Attorney General’s proposal of presuming unfair leverage regarding price increases in markets with five or fewer players is conservative, because during an abnormal market disruption, pricing power and term-setting power exists at a lower threshold than in a normal economy. The increased demand or decreased supply caused by the market disruption decreases the ability of consumers to turn to reasonable substitutes, either because of a sudden change in price elasticity of demand or because of the lack of reasonable substitutes. An abnormal market disruption can enhance pricing power by building or strengthening a moat around an existing industry: Entry costs rise steeply, borrowing becomes difficult, investors are wary, and customers—whether private or governmental—may turn to known entities.⁷² Disruptions can increase the relative market power of firms within an already concentrated industry.⁷³ As a result, during an abnormal market disruption, firms that might not otherwise have pricing power pre-disruption are able to profitably raise prices without any accompanying efficiency-enhancing effect.

4. Costs:

Inflation, AM. PROSPECT (Feb. 2, 2022), <https://prospect.org/economy/antitrust-should-be-used-to-fight-inflation/> (“[E]conomics teaches us that concentrated industries are more susceptible to price-fixing. The pandemic provides the cover for coordinated pricing. Indeed, general inflation can serve as a pretext for a coordinated price hike.”).

⁶⁹ John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837 (2017).

⁷⁰ *Id.* at 865.

⁷¹ *Id.* at 850; see FED. TRADE COMM’N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011, 3 n.17 (2013) <https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf>, (“These firms usually have market shares in excess of 10%, but market shares alone are not determinative of significance.”)

⁷² See, e.g., Bengt Holmstrom & Jean Tirole, *Financial Intermediation, Loanable Funds, and the Real Sector*, 112 Q.J. ECON. 663 (1997) (suggesting that during economic disruptions that affect financial intermediaries’ lending capacity, investors and intermediaries reallocate away from poorly capitalized firms to more highly capitalized firms).

⁷³ See, e.g., Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, at 25-27 (2020), available at <https://scholarship.law.georgetown.edu/facpub/2285>, published at 58 REV. INDUS. ORG. 81 (2021).

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action, but because of the evidence that New Yorkers were being harmed, concluded that action was prudent.

The Attorney General welcomes comments on alternative ways to conservatively identify the particular firms that have unique power to shape prices in times of market disruption. In particular, the OAG seeks comment on whether four- or five-firm concentration would be an appropriate way to measure leverage.

As mentioned above, the language of significant competitor comes from the work of John Kwoka, and the 10% presumption comes from the FTC presumption. The Attorney General seeks public commentary on the term significant competitor and whether there are other ways to define the term significant competitor to achieve the desired ends.

The OAG also seeks comment on other ways to measure firms whose absolute size may be a proxy for leverage. When economists research firms, there is no single metric for what constitutes a “large firm.” Inasmuch as the Attorney General determines that a revenue threshold is the best approach for a presumption, the Attorney General welcomes comments as to the best revenue number. The Attorney General welcomes comments on what besides \$5 billion in revenue might be a measure that reflects the legislative aims, both in terms of revenue and other similar metrics, like assets.

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

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 6

Proposed Action: Add New Part 500.6 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Codify judicial interpretation of statutory language and provide guidance on which transactions are covered.

Text of proposed rule:

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

All parties within the chain of distribution, including manufacturers, suppliers, wholesalers, distributors, or retail sellers of goods, are subject to the statute with respect to products sold in the state.

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits: The proposed rule provides clarity regarding the statute's statement 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 when the product sold was located in the state prior to the sale.” The legislative history makes clear that this text is intended to extend the application of General Business Law 396-r to all parties in the supply chain “whose products are sold in the state.”⁷⁴ The proposed rule codifies the interpretation of the statute reflected in the text and the legislative history, as recently affirmed in *People v Tyson Foods*, Index No. 156457/2022, NYSCEF Doc. No. 45 (Sup Ct, NY County, Dec 7, 2022).

4. Costs:

a. Costs to regulated parties: The OAG does not anticipate any additional costs to regulated parties because the proposed rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives: The Attorney General considered no action, but concluded that action was prudent in the interests of clarifying the scope of the statute.

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

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

⁷⁴ Senator Stafford, New York State Introducer’s Memo in Support (1998) S6020A.

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.

Rule 7

Proposed Action: Add New Part 500.7 of Title 13 NYCRR

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

Subject: Price Gouging

Purpose: Create a presumption of a comparable pre-disruption price for sellers who use automatic dynamic pricing algorithms

Text of proposed rule:

500.7 Dynamic Pricing

The pre-disruption price for sellers who use dynamic pricing can be determined by using the median price for the same good or service at the same time one week prior to the abnormal disruption of the market. A seller who would be liable for price gouging due to this provision 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.

Regulatory Impact Statement

1. Statutory authority: [same as Rule 1]

2. Legislative objectives: [same as Rule 1]

3. Needs and benefits:

Although algorithmically-driven dynamic pricing largely did not exist when the statute was initially passed, the statutory text prohibits the use of dynamic pricing during abnormal market disruptions. Dynamic pricing exists when a seller increases prices in response to a supply

contraction or a demand expansion.⁷⁵ Automatic dynamic pricing occurs when the price increases automatically in such a circumstance, without human decision-making approving that particular increase. For instance, if an online retailer’s algorithm detects an increase in demand for a jar of peanut butter, it may automatically increase the price by several dollars, and if demand is reduced an hour later, reduce it again.⁷⁶

Dynamic pricing leads to situations in which there are a wide variety of pre-disruption prices. The pre-disruption “price” may not be easily discernable, making enforcement difficult. In the day, week, and month preceding the disruption, the prices for the good or services if mapped on a chart would not look like a single point, but like a scatter plot, representing a wide range of prices.

The “price” of the aforementioned jar of peanut butter for residents of Albany, for instance, might include prices ranging from \$3.99 to \$4.60 in the week prior to a market disruption. After a market disruption, if a consumer brings a complaint for a \$4.70 jar of peanut butter, the question becomes whether the \$4.70 jar represents a relatively small price increase, or unconscionably excessive pricing (assuming constant costs). Multiply that by a range of complaints of peanut butter jars costing between \$4.50 and \$5.00, and the problem becomes more complex. The “price” of a delivery service may also vary substantially, with a 2-hour grocery shopping and delivery ranging from \$40 to \$80, depending on the seller of the delivery services’ analysis of the willingness to pay, based on time of day, day of the week, and individual purchaser characteristics.

Rulemaking is needed because in the absence of rulemaking, it may be unclear what baseline price can be used to determine whether a price increase is unconscionably excessive. For instance, should a \$50 car service ride from point A to point B be compared to a \$30 ride from point A to point B a few days earlier, a \$50 ride a five days earlier, or the average of all rides in the previous time period?

The presumption of the median cost of the commodity or service sold in the same geographic area at the same time a week prior to the abnormal market disruption for several reasons was chosen for several reasons.

⁷⁵ See Conn. Gen. Stat. Ann. § 13b-118 (West) (“For the purposes of this subdivision, ‘dynamic pricing’ means offering a prearranged ride at a price that changes according to the demand for prearranged rides and availability of transportation network company drivers”); 53 Pa. Stat. and Cons. Stat. Ann. § 57A01 (West) (defining dynamic pricing as “[a] transportation network company’s practice of adjusting the calculation used to determine fares at certain times and locations in response to the supply of transportation network company drivers and the demand for transportation network company drivers’ services”); Md. Code Regs. 11.07.05.02 (“‘Dynamic pricing’ means a method of calculating the toll where the dynamic pricing mileage rate varies within the approved toll rate range in real time.”).

⁷⁶ Daisuke Wakabayashi, *Does Anyone Know What Paper Towels Should Cost?*, N.Y. TIMES (Feb. 27, 2022), <https://www.nytimes.com/2022/02/26/technology/amazon-price-swings-shopping.html>; Institute for Local Self-Reliance, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf> (“These dynamic pricing algorithms adjust prices in real time, minute-by-minute, in response to numerous factors, including price changes made by other sellers. Dynamic pricing can result in lock-step price changes, as one seller’s price adjustment triggers another, which triggers another, and so on.”).

First, many goods and services that are priced using dynamic pricing have peaks and valleys that follow the time of day and day of the week. A typical rush hour ride-hailing drive will often be different than a typical 5 AM ride-hailing drive. A midweek childcare service will often have different average prices than a weekend childcare service. The prior week, instead of the prior hour, or day, seems the most likely to enable apples to apples comparators.

Second, the Attorney General felt that the median price was the best choice among the alternatives she considered. One alternative the Attorney General considered was using the lowest price charged for a good in the relevant period, but it was determined that such a rule would unduly constrain dynamic prices without sufficient consumer benefit. Using the highest price charged during the relevant period, or some subset of the highest prices charged (as a 2014 agreement with Uber did) would lead to far too much condoned profiteering. Failing to provide a rule at all leaves too much uncertainty for businesses, enforcers and courts trying to make the best and fairest comparison of pre- and post-disruption prices. This rule balances the interests of firms in using dynamic pricing with an easily administrable enforcement mechanism to protect the public.

It does not prohibit the Attorney General from using other methods for determining a baseline price but creates an easily administrable presumption.

4. Costs:

a. Costs to regulated parties: The OAG anticipates some costs to regulated parties who employ automated dynamic pricing algorithms in order to ensure that such algorithms comply with the proposed rule. The OAG welcomes comments from regulated parties regarding the initial costs of implementing the proposed rule. The OAG also welcomes comments regarding any recurring costs of implementing the proposed rule.

b. Costs to agency, the state and local governments: The Office of the Attorney General does not anticipate that it will incur any additional costs as a result of this proposed rule. The OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency and state and local governments is based on the assessment of the Attorney General.

5. Local government mandates: The proposed regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: No paperwork requirements will be imposed upon regulated parties under the proposed regulation.

7. Duplication: There is no federal price gouging statute. None of the provisions of the proposed rules conflict with federal law.

8. Alternatives

The Attorney General considered no action, but given the increasing prevalence of dynamic pricing and the lack of clarity about how to apply the statute to these situations, providing a clear rule reduces uncertainty for businesses.

In addition, the Attorney General was concerned that an old agreement with a single counterparty is still influencing industry behavior. Eight years ago, when dynamic pricing was relatively new, the Office of the Attorney General entered into an agreement with Uber to preemptively address price-gouging.⁷⁷ 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 2017.⁷⁸ While that agreement may have been valuable given its time and context, the sophistication of dynamic pricing, and our understanding of it, has changed substantially over the last eight years. The agreement allowed for significant above-cost price increases during market disruptions.⁷⁹

The Attorney General considered a more ride-hailing specific rule, but concluded that although ride hailing is the most prominent service using dynamic pricing, there are several firms that now use dynamic pricing such as childcare service platforms, delivery service platforms, and online retailers, and some suggestion that these numbers will grow.⁸⁰ Therefore, the Attorney General concluded it was important to address all industries using this pricing model.

The Attorney General welcomes comments on this rule, or proposals for alternatives. In particular, the Attorney General welcomes comments on whether the median price from a week earlier should be replaced with the average or median of the prior three or four weeks, or some other set of data.

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

⁷⁷ Letter from Eric T. Schneiderman, Att’y Gen. of N.Y., to Travis Kalanick, Co-Founder/CEO, Uber Technologies, Inc. (July 8, 2014), https://ag.ny.gov/pdfs/Uber_Letter_Agreement.pdf.

⁷⁸ *Id.* at 2 (“This agreement . . . shall expire and be deemed null and void three days after it takes effect.”).

⁷⁹ In New York City alone, there are approximately fifteen million rides a month between Uber and Lyft. See Todd W. Schneider, *Taxi and Ridehailing Usage in New York City*, <https://toddwtschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/> (finding an average 423,751 Uber trips per day in New York City in March 2022 and 171,525 Lyft trips per day in New York City in March 2022); NYC Taxi and Limousine Commission, *Monthly Data Reports*, <https://www1.nyc.gov/site/tlc/about/aggregated-reports.page> (finding an average 591,746 high-volume FHV trips per day in New York City in April 2022, and an average 595,270 high-volume FHV trips per day in New York City in March 2022). Uber in New York City constitutes approximately 400,000 rides per day. See Schneider, *supra* (finding an average 423,751 Uber trips per day in New York City in March 2022 and an average 408,604 Uber trips in February 2022). Therefore, these highest numbers from the four highest days can be very high. Imagine, for instance, that the average price per mile during rush hour in Manhattan is \$10. In the last sixty days, there was one day where the highest price per mile of the approximately 100,000 rides was \$50, another in which it was \$49, another in which it was \$48, and a fourth in which it was \$46. The \$46 ride is the cap, well over the average of \$10, and well over the overwhelming majority of rides.

⁸⁰ Institute for Local Self-Reliance, Comment Letter on Advance Notice of Proposed Rulemaking pursuant to N.Y. Gen. Bus. L. §396-r(5) (Apr. 22, 2022), <https://ag.ny.gov/sites/default/files/stopillegalprofiteering-public-comments.pdf>.

10. Compliance Schedule: The proposed rules will go into effect sixty (60) days after the publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for the proposed regulation is not being submitted because it is apparent from the nature and purpose of the regulation that it will not have a substantial adverse impact on small businesses or local governments. Small businesses will be subject to the rule, but it requires no additional reporting on their part. The proposed rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed regulation is not being submitted because the regulation will not impose any adverse impact or significant new reporting, record keeping or other compliance requirements on any public or private entities in rural areas.