

Advance Notice of Proposed Rulemaking
pursuant to N.Y. Gen. Bus. L. § 396-r(5) (Price Gouging)

I. Summary

The New York State Office of the Attorney General (the “Office” or the “Attorney General”) is issuing this Advance Notice of Proposed Rulemaking (“ANPRM”) to solicit comments, data, and other information to assist the Office in crafting rules to prevent price gouging pursuant to New York General Business Law § 396-r (“GBL 396-r”).¹

The COVID-19 pandemic led to significant price increases for consumers, patients, retailers, and state and local governments in New York. Low-income New Yorkers were the most impacted. Some of the inflation was caused by disruptions in supply chains and increased costs, as well as price hikes for nonessential products and services. However, some of the increases in prices for essential goods and services likely constituted illegal pricing gouging. GBL 396-r prohibits “unconscionably excessive” pricing which includes “unconscionably extreme pricing” and pricing using “unfair leverage or unconscionable means.” The statute is broadly written to cover price gouging at every point in the supply chain.

This ANPRM is structured as follows. Part I summarizes New York State’s price gouging statute. Part II provides background on the COVID-19 pandemic and on pricing that raises questions about price gouging. Part III lays out the economic context in which price gouging is likely to occur. Part IV asks for public comment on a series of questions about whether and how the Attorney General might provide regulatory guidance in this area.

Comments should be submitted to stopillegalprofiteering@ag.ny.gov by April 15, 2022.

II. New York State’s Price Gouging Statute

GBL 396-r 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.²

The statute defines an “abnormal disruption of the market” as either an “actual or imminently threatened” change in the market resulting from “stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency” or a disruption “which results in the declaration of a state of emergency by the governor.”³

¹ The statute authorizes the Attorney General to “promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section.” N.Y. Gen. Bus. L. § 396-r(5).

² *Id.* § 396-r(2).

³ *Id.*

Covered goods and services include: (1) vital and necessary consumer goods and services, (2) vital and necessary medical supplies and services, and (3) other vital and necessary goods and services “used to promote the health or welfare of the public.” GBL 396-r also covers emergency repairs “made by any party within the chain of distribution.”⁴

Whether a price is unconscionably excessive “is a question of law for the court.” The statute lays out two kinds of “unconscionably excessive” pricing. First, where “the amount of the excess in price is unconscionably extreme.” Second, where the price was set through either “an exercise of unfair leverage” or “unconscionable means.”⁵ The statute makes clear that a case may be supported by a combination of the two kinds of excessive pricing.

A prima facie case for a violation of GBL 396-r can be established by showing either (i) “a gross disparity” between the allegedly excessive price, 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,” or (ii) that the allegedly excessive price “grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area.” If established, such a prima facie case can be rebutted by showing that the price increase “preserves the margin of profit” that the defendant received prior to the disruption, or that the defendant incurred “additional costs” not within its control. These defenses only apply to the margins and costs of the goods and services for which prices were raised.⁶

GBL 396-r applies to all parties within the chain of distribution: “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.”⁷

Enforcement of GBL 396-r is entrusted to the Attorney General, who may seek, *inter alia*, (i) an injunction; (ii) a civil penalty up to \$25,000 per violation or three times the gross receipts, whichever is greater; and (iii) restitution.⁸ Section 396-r was modified by the Legislature in June 2020, three months into the pandemic, in several ways that indicate that the Legislature considers price gouging a significant threat to the well-being of New Yorkers, and that the statute needed a broader reach to stop harmful conduct. The modifications expanded the scope of the statute by removing language that suggested only consumers were harmed by price gouging. It added not only medical supplies and services, but a broad catchall provision covering “any” essential goods and services “used to promote the health and welfare of the public.” It added an affirmative defense applicable where sellers preserve their pre-disruption profit margins, underlining that the core purpose of the statute is to prohibit profiteering in a disruption. Finally, it added the rulemaking authority upon which this ANPRM is based, indicating that it believed that the Attorney General, through rulemaking, could play a significant role in deterring price gouging.⁹

⁴ *Id.*

⁵ *Id.* § 396-r(3)(a).

⁶ *Id.* § 396-r(3)(c).

⁷ *Id.* § 396-r(2).

⁸ *Id.* § 396-r(4).

⁹ 2020 N.Y. Sess. Laws ch. 90 (McKinney’s) (Senate Bill S8189, enacted June 6, 2020).

III. Prices and Profitability During the COVID-19 Pandemic

New York State is currently experiencing an “abnormal disruption of the market.” The state is in an ongoing severe health crisis and has faced disruptions to supply chains, large shifts in demand for goods and services and supply of labor, and reductions in manufacturing output in certain industries. COVID-19 led to the worst economic crisis in New York since the Great Depression, and massive unemployment.¹⁰

The state is experiencing one of the biggest inflation increases in decades.¹¹ According to the Bureau of Labor Statistics, the Consumer Price Index (“CPI”)¹² in the New York, Newark, and Jersey City metropolitan area increased by 5.1% from January 2021 to January 2022.¹³ The Bureau of Labor Statistics does not generate data that gives insight into rural areas such as upstate New York, but the entire United States experienced a 7.5% increase in the CPI in the last year, the highest since 1982.¹⁴

New Yorkers experienced significant price increases across the board, including in essential goods and services. From January 2021 to January 2022, for instance, gasoline prices increased 39.6%; the cost of used vehicles increased 41.6%; the cost of new vehicles increased by 18.4%; transportation costs increased 13.1%; the cost of meats, poultry, fish, and eggs increased 16%; and household energy costs increased 21.4%.¹⁵

These and other price increases affected all New York households, with the heaviest burden falling on those with low incomes. For instance, the poorest 20% of families spend around 27% of their budgets on food, so even a small increase in food prices can lead to foregoing necessities.¹⁶ Households in the bottom 20% of income pay on average 33.9% of their income toward health care. A quarter of households spend at least 6% of their income on energy costs, and a tenth spend over 10%, so when energy costs spike, people frequently cannot pay their

¹⁰ Matthew Haag & Patrick McGeehan, *The ‘Double Whammy’ That Is Slowing New York City’s Job Growth*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/2021/12/14/nyregion/nyc-economy-jobless.html>.

¹¹ See, e.g., Drew DeSilver, Pew Research Center, *Inflation has risen around the world, but the U.S. has seen one of the biggest increases* (Nov. 24, 2021), <https://www.pewresearch.org/fact-tank/2021/11/24/inflation-has-risen-around-the-world-but-the-u-s-has-seen-one-of-the-biggest-increases/>; Jeanna Smialek, *Inflation Warning Signs Flash Red, Posing Challenge for Washington*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/business/economy/inflation-supply-chain.html>.

¹² The CPI measures the price of a representative basket of consumer goods and services purchased by U.S. households. Goods and services included in the CPI include rent, groceries, gasoline, and health care among others. Each month, the change in CPI over the preceding 12 months is used as a measure of annual inflation. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Handbook of Methods, Consumer Price Index: Overview*, available at <https://www.bls.gov/opub/hom/cpi/> (last visited Feb. 8, 2022).

¹³ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Economic News Release: Consumer Price Index, New York-Newark-New Jersey* (Feb. 10, 2022), https://www.bls.gov/regions/new-york-new-jersey/news-release/consumerpriceindex_newyorkarea.htm.

¹⁴ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Economic News Release: Consumer Price Index Summary* (Feb. 10, 2022), <https://www.bls.gov/news.release/cpi.nr0.htm>.

¹⁵ U.S. Dep’t of Labor, *CPI Databases, All Urban Consumers*, *supra* note 13. This data covers the New York City/New Jersey Metropolitan area, not the entire state.

¹⁶ U.S. Dep’t of Agriculture, Econ. Res. Serv., *Food spending as a share of income declines as income rises* (Nov. 8, 2021), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58372>.

bills.¹⁷ The 50.9% increase in gasoline prices has had an especially large impact on lower income families, where pre-pandemic households spent on average 14% of their income on gasoline.¹⁸

Many of these price hikes were legal, but when steep price hikes during an abnormal disruption are accompanied by increases in profitability, it raises questions about whether price gouging occurred. What follows are two examples of pricing for essential goods during the pandemic that raise questions about “unconscionably excessive pricing” and the use of “unfair leverage or unconscionable means.”

A. **Beef**

During the pandemic, the price of meat went up sharply, constituting half of the price increases of food bought at grocery stores. Beef prices were a large part of that price spike.

The price hikes cannot be explained by supply chain disruption and increased costs alone. Four major companies in the meat packing industry—Cargill, Tyson, JBS, and National Beef Packing Company—account for 70% of beef sales in the United States.¹⁹ Though they experienced a reduction in volume during the pandemic, the increase in beef prices led to an overall increase in their dollar sales and an even larger increase in their profits. The meatpackers had a 120% increase in gross profits and 500% increase in net income.²⁰ In the fourth quarter of 2021 (ending last fall, for instance, Tyson reported a 32.7% increase in prices and a 17.3% increase in dollar sales despite a decrease in beef volume.²¹ Tyson reported a 110.1% increase in profit margins for beef from the previous year. JBS US similarly reported a 127% increase in profit margins.²² Marfrig (the Brazilian parent of National Beef) had its net profits increase by 149% worldwide.²³

At the same time, New York families were facing sticker shock at the grocery store. Beef prices rose 30% between January 2021 and January 2022.²⁴ The increases are especially hard on the poorest one-fifth of households, who spend over a quarter of their income on food. Because meat prices have such a big impact on the purchasing power of low-income households, these price hikes left New Yorkers choosing between food, medical care, and transportation.

¹⁷ ARIEL DREHOBL, LAUREN ROSS, & ROXANA AYALA, AMERICAN COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY, HOW HIGH ARE HOUSEHOLD ENERGY BURDENS? (2006), <https://www.aceee.org/sites/default/files/pdfs/u2006.pdf>.

¹⁸ See, e.g., SHRUTI VAIDYANATHAN, PETER HUETHER, & BEN JENNINGS, AMERICAN COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY, UNDERSTANDING TRANSPORTATION ENERGY BURDENS (2021).

¹⁹ *Explainer: How four big companies control the U.S. beef industry*, REUTERS (June 17, 2021), <https://www.reuters.com/business/how-four-big-companies-control-us-beef-industry-2021-06-17/>.

²⁰ See, e.g., Brian Deese, Sameera Fazili & Bharat Ramamurti, White House, Briefing Room, Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/>.

²¹ Tyson Foods, Inc., Current Report (Form 8-K), Ex. 99.1, at 2 (Nov. 15, 2021).

²² *Id.* at 6; JBS S.A., JBS Ends 3Q21 with Net Income of R\$7.6 Billion (Nov. 10, 2021), [https://api.mziq.com/mzfilemanager/v2/d/043a77e1-0127-4502-bc5b-21427b991b22/5c65b4c8-a358-615f-bf06-277f30fc22d3?origin=1](https://api.mziq.com/mzfilemanager/v2/d/043a77e1-0127-4502-bc5b-21427b991b22/5c65b4c8-a358-615f-bf06-277f30fc22d3?origin=1;); JBS S.A., Earnings Release Third Quarter 2020 (Nov. 11, 2020), <https://api.mziq.com/mzfilemanager/v2/d/043a77e1-0127-4502-bc5b-21427b991b22/9077303c-b25f-6724-8ab5-b839ac5b6eb2?origin=1>.

²³ Marfrig Global Foods S.A., Release de Resultados 3T21 (Oct. 25, 2021), <https://api.mziq.com/mzfilemanager/v2/d/b8180300-b881-4e6c-b970-12ad72a86ec8/2383b1e5-2e88-3cbf-d89f-e29ce7bc3de7?origin=1>.

²⁴ IndexBox, U.S. Meat Prices: Broilers Gain Most, Inflation Accelerates on Rising Feed Costs (Jan. 27, 2022), <https://www.indexbox.io/blog/u-s-meat-price-broilers-gain-most-inflation-accelerates-on-rising-feed-costs/>.

B. Shipping

Shipping price increases impact all New Yorkers because they lead to higher prices across the board for consumer goods, including for essential goods, as well as for medical supplies.

Shipping prices went up substantially in 2020 and 2021. According one industry expert, the price to ship a 40-foot container from Shanghai to Los Angeles went up 75% between December 2020 and December 2021. Another reported that Shanghai to West Coast prices more than doubled between 2019 and late 2021.²⁵ Shipping costs impact the costs of automotive parts, medical supplies, and everyday food items.²⁶ The price hikes appear to be caused by a combination of actual supply chain disruptions and the motivation to increase profits.

The eight largest global container shipping companies had net profits of \$48.1 billion in the last quarter of 2021, nine times more than their record third quarter profits of 2020.²⁷ The world's largest shipping company, A.P. Møller–Maersk, announced its most profitable quarter in its 117-year history, with a 278% increase in profits from 2020 to 2021.²⁸ UPS posted its best year ever in 2021 and announced substantial price hikes in 2022.²⁹ DHL imposed several price hikes during the pandemic, justifying them by inflation and the need for infrastructure investment,³⁰ but also boasted record profits in 2021, including its most profitable quarter ever in early 2021.³¹

C. Other industries

Meat and shipping are not isolated instances of big price increases impacting vulnerable New Yorkers who are struggling in a global pandemic. Nor are they isolated instances of increased profitability accompanying those price increases.

²⁵ See, e.g., Jennifer Smith, Paul Berger & Lydia O'Neal, *Shipping and logistics are expected to keep rising in 2022*, WALL ST. J. (Dec. 19, 2021), <https://www.wsj.com/articles/shipping-and-logistics-costs-are-expected-to-keep-rising-in-2022-11639918804>.

²⁶ See, e.g., Evelyn Cheng, *Surging shipping costs will drive up prices for some consumer products by 10%, new UN report finds*, CNBC (Nov. 18, 2021), <https://www.cnbc.com/2021/11/19/surging-shipping-costs-to-drive-consumer-price-inflation-unctad-says.html>.

²⁷ Marcus Hand, *Container shipping Q3 profits surpass tech giants*, SEATRADE MARITIME NEWS (Nov. 22, 2021), <https://www.seatrade-maritime.com/finance-insurance/container-shipping-q3-profits-surpass-tech-giants>; Nicole Goodkind, *Shipping container lines on track make a record-breaking \$150 billion this year from the supply chain breakdown*, FORTUNE (Dec. 3, 2021), <https://fortune.com/2021/12/03/shipping-container-record-profit-supply-chain-breakdown/>.

²⁸ See, e.g., Grace Kay, *The supply-chain crisis propelled the world's largest shipping company to its most profitable quarter in 117 years*, BUSINESS INSIDER (Nov. 2, 2021), <https://www.businessinsider.com/largest-shipping-company-maersk-most-profitable-quarter-supply-chain-crisis-2021-11>; Goodkind, *supra* note 28.

²⁹ Paul Ziobro, *UPS, Delivering Amazon's Surge, Posts Record Revenue*, WALL ST. J. (Feb. 2, 2021), <https://www.wsj.com/articles/ups-revenue-jumps-21-on-online-shopping-surge-11612266696>.

³⁰ Lydia O'Neal, *DHL Raising Rates for U.S. Shippers by 5.9%*, WALL ST. J. (Oct. 1, 2021), <https://www.wsj.com/articles/dhl-raising-rates-for-u-s-shippers-by-5-9-11633089600>.

³¹ Deutsche Post DHL Group, Press Release, *Deutsche Post DHL Group expects record earnings in 2021 of more than EUR 7.7 billion—mid-term outlook also raised* (Nov. 4, 2021), <https://www.dpdhl.com/en/media-relations/press-releases/2021/deutsche-post-dhl-group-financial-figures-q3-2021.html>.

Other industries which have seen big price and profitability increases include auto dealers,³² supermarkets,³³ fast food,³⁴ oil and natural gas,³⁵ and lumber.³⁶ As with the two examples listed above, high prices and profitability may be legal or may be examples of price gouging that is illegal under New York law.

Digital.com, a website that reviews products and services for small businesses, reported that 56% of the 1,000 businesses they surveyed in November 2021 increased prices beyond inflation to boost profitability.³⁷ According to the Federal Reserve Bank of Saint Louis, corporate profits have increased more than 100% in the past year, significantly above the rate of inflation.³⁸ These record-setting profits by big companies have led to a 70-year high in corporate profit margins. Two-thirds of the United States' largest publicly traded companies had higher profits in 2021 than they did before the pandemic. One report concluded that in the second quarter of 2021, right in the middle of the pandemic, the share of GDP composed of profits for all United States corporations was the second highest on record since 1960. A hundred of the largest publicly traded companies had 2021 profit margins at least 50% above 2019 levels.³⁹

D. At-Home COVID-19 Tests

The pandemic also led to new products that became essential—and costly—for New Yorkers. For instance, at-home COVID-19 tests became a critical public health tool during the pandemic. People are encouraged to test regularly when they have symptoms or contact with people with COVID-19.

Many New Yorkers were required or strongly encouraged to test to be eligible for work assignments, and to test their children as a condition of school or daycare attendance if they had symptoms. They could not avoid the high prices of test kits without jeopardizing their livelihoods and access to childcare. Most over-the-counter rapid COVID-19 tests cost between \$17 and \$25. For a family of four, testing once or twice a week at current pricing could cost between \$160 and \$400 a month. The tests represented a new ongoing cost to already strapped budgets.

³² David Muller, *Dealerships have already beat 2020's profit record*, AUTOMOTIVE NEWS (Nov. 15, 2021), <https://www.autonews.com/dealers/auto-dealerships-have-blown-past-2020-profit-records>.

³³ The Food Industry Association, *Grocery Store Chains Net Profit*, <https://www.fmi.org/our-research/supermarket-facts/grocery-store-chains-net-profit> (last visited Feb. 15, 2022).

³⁴ Julie Creswell, *How Much Are You Willing to Pay for a Burrito*, N.Y. TIMES (Jan. 21, 2022), <https://www.nytimes.com/2022/01/21/business/fast-food-prices-inflation.html>.

³⁵ Stanley Reed, *Shell's profit jumps, riding higher prices for oil and natural gas*, N.Y. TIMES (Feb. 3, 2022), <https://www.nytimes.com/2022/02/03/business/shell-4q-earnings.html>.

³⁶ Lance Lambert, *Sawmill profits soared 200%--now the bursting lumber bubble is bringing back reality*, FORTUNE, (Nov. 18, 2021), <https://fortune.com/2021/11/18/sawmill-profits-soared-bursting-lumber-bubble-bringing-them-back-down/>. The combined net profits of the five largest North American lumber producers jumped 2,218% between the second quarter of 2020 and 2021.

³⁷ Digital.com, *More than half of retail businesses are using inflation to price gouge* (Nov. 30, 2021), <https://digital.com/half-of-retail-businesses-using-inflation-to-price-gouge/>.

³⁸ Fed. Res. Bank of St. Louis, *FRED Economic Data: Corporate Profits After Tax (without IVA and CCAAdj)*, <https://fred.stlouisfed.org/series/CP> (last visited Feb. 7, 2022).

³⁹ Kristin Broughton & Theo Francis, *What Does Inflation Mean for American Businesses? For Some, Bigger Profits*, WALL ST. J. (Nov. 14, 2021), <https://www.wsj.com/articles/inflation-yellen-biden-price-increase-cost-shipping-supply-chain-labor-shortage-pandemic-11636934826>.

Several questions have been raised by public officials about these test kits. Senators Ed Markey and Richard Blumenthal asked the Federal Trade Commission to investigate possible price gouging.⁴⁰ Their letter to the FTC cited evidence that the cost of manufacturing the tests is a fraction of the price at which it is being sold.⁴¹

For these and similar products, the question of what constitutes price gouging is complicated under New York law, because there are no pre-disruption prices for comparison. At the same time, the importance of these new products to New Yorkers during this abnormal disruption certainly provided manufacturers and distributors of at-home test kits with leverage that could potentially be exercised unfairly. In Section V, we ask how New York's price gouging law should apply, if at all, to essential products that entered the market after the abnormal disruption, but whose value and demand flow directly from the reasons for the disruption, resulting in new or enhanced pricing power.

IV. Economic Framework

At the onset of the pandemic, the economy experienced shortages of several goods and services. Businesses restricted their activity, laid off workers, and reduced production. At the same time, consumers spent more time at home and increased their demand for products such as groceries, household energy, furniture, and electronics. As consumers tried to avoid public transportation, they also increased their demand for cars and gasoline. As demand for these products increased, there was a severe disruption in the supply chain due to backlogged ports as well as shortages of warehouses, containers, and truck drivers.⁴² These developments raised costs for raw materials, labor, and the transportation of goods in many industries, forcing companies to raise prices to cover those costs.

Uncertainty about the future availability of certain goods led some buyers to hoard goods above their immediate needs. Producers did not increase production because they anticipated that the shortage would be short-lived. These behaviors prolonged the shortages for months.

All these factors undoubtedly drove up prices.⁴³ However, the current economic data discussed above, which show substantial profit increases during the COVID-19 pandemic, demonstrate that higher costs caused by supply chain disruptions, hoarding, production-stoppages, and changes in demand are insufficient to explain the higher inflation rates that New York consumers, patients, retailers, and local governments have been experiencing. Instead, the data on record-level

⁴⁰ Kris Van Cleave, *Lawmakers call for investigation into reports of at-home COVID test price gouging*, CBS NEWS (Jan. 19, 2022), <https://www.cbsnews.com/news/senators-seek-information-covid-test-price-gouging/>.

⁴¹ *Id.*

⁴² See, e.g., Rebecca Heilweil, *Shipping is broken. Here's how to fix it*, RECODE (Nov. 5, 2021), <https://www.vox.com/recode/2021/11/5/22764088/supply-chain-shipping-delays-logistics>; John Burnett, *Waiting on that holiday gift from your online cart? It might be stuck at a seaport*, NAT'L PUB. RADIO (Nov. 5, 2021), <https://www.npr.org/2021/11/05/1048678575/waiting-on-that-holiday-gift-from-your-online-cart-it-might-be-stuck-at-a-seapor>; Peter S. Goodman, *'It's Not Sustainable': What America's Port Crisis Looks Like Up Close*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/11/business/supply-chain-crisis-savannah-port.html>.

⁴³ See, e.g., DeSilver, *supra* note 11; Smialek, *supra* note 11.

profitability suggest that some of the past price hikes and current inflation are the result of companies taking advantage of the disruption to raise prices beyond the need to cover costs.

A disruption in the economy can create market power by building a moat around an existing industry: entry costs rise steeply, borrowing becomes difficult, investors are wary, and customers—whether private or governmental—turn to known entities. For the same reasons, a disruption can enhance existing market power by strengthening the relative market power of firms within an already concentrated industry.⁴⁴ A disruption also reduces the price sensitivity of consumers, patients, and governments, who are desperate to get access to essential goods. Demand for certain products becomes less elastic, allowing sellers to increase their prices even in the absence of increased costs.

Moreover, a disruption can give cover to companies with existing market power to raise prices under the guise of economy-wide inflation.⁴⁵ Consumers either find inflation to be a plausible explanation for price increases or cannot distinguish between supply-chain-driven increases and profit-driven increases.

There is an elevated risk of increased prices in highly concentrated industries, where the small number of companies dominating that industry are more likely to adopt similar pricing strategies and have less incentive to undercut their competitors.⁴⁶ For instance, the meat-packing industry (mentioned above) went through rapid consolidation during the 1980s and 1990s, when a reduction in the wage paid by larger plants and the emergence of technological economies of scale led smaller firms to leave the market and slaughterhouses to become much larger. A recent White House report argued that consolidation has allowed the companies to pay less to cattle rangers while charging consumers more.⁴⁷

Similarly, when prices are pegged to industry indexes, it is easier for firms to converge on higher prices. When all market participants increase their prices contemporaneously, consumers are prone to blame inflation rather than individual companies' pricing decisions and to be more accepting of the price increases. One example is the egg industry—an industry that has been the subject of prior price gouging enforcement activity by the Office. Most egg producers peg their egg prices to indices set by Urner Barry—indices that are based, at least in part, on market assessments provided by the major companies in the industry. Thus, egg prices are determined using a “feedback loop” where: (i) egg producers communicate to Urner Barry their assessment of egg prices; (ii) Urner Barry uses these assessments to create price indices, which are later sent to the producers; and (iii) the egg producers sell their eggs at prices based on the Urner Barry indices. This pricing method is not tied to costs and, in periods of disruption, it may allow egg producers to converge to a higher price even in the absence of cost increases.

⁴⁴ 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).

⁴⁵ See, e.g., 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/> (“[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.”).

⁴⁶ *Id.*

⁴⁷ See Deese, Fazili & Ramamurti, *supra* note **Error! Bookmark not defined.**

The economic costs of companies using abnormal disruptions, including the current supply-chain disruptions and the overall increase in inflation, to justify charging higher prices can be significant and long-lasting.⁴⁸ When price increases persist, they can lead buyers to believe that they are inevitable, thus continuing the inflationary spiral. Meanwhile, low-income buyers are forced to absorb these price increases by using government financial assistance, depleting their savings, or turning to high interest loans.

While raising prices to increase profits is often tolerated in our legal system (except where a firm engages in illegal monopolization), our laws recognize that there are special contexts in which such behavior cannot be tolerated. New York’s price gouging law places restrictions on rent-seeking with respect to essential goods and services during times of abnormal disruptions. It serves the interest of economic stability, by preventing a disruption from triggering a broader economic downturn and exacerbating individual suffering. Most importantly, the law protects poor and working-class New Yorkers who are the most likely to be exposed to price increases in essential items, the least likely to have savings to cover crises, and the most likely to have to choose between going into debt or foregoing essential goods and services.

V. Questions for Public Comment

The Attorney General is issuing this ANPRM to solicit comments, including consumer experiences, market data, and other industry information that will assist the Office in determining what rulemaking would help deter price gouging under GBL 396-r, and what examples of pricing behavior during the COVID-19 disruption can inform rulemaking. The Attorney General seeks the broadest participation in the rulemaking and encourages all interested parties to submit written comments. In particular, the Attorney General seeks comment from interested parties—including consumers, consumer advocacy groups, industry participants, and other members of the public—on the following questions. Please provide examples, data, and analysis to back up your comments.

Comments should be submitted to stopillegalprofiteering@ag.ny.gov by April 15, 2022.

A. General Questions

- 1) One distinct feature of New York’s price gouging statute is that it applies to suppliers and distributors. What kinds of price gouging by suppliers and distributors is most likely to occur in a pandemic, and how would enforcers detect it?
- 2) What, if any, forms of coordinated conduct (such as agreements to restrict supply) facilitate illegal price gouging?

⁴⁸ See, e.g., Molly Smith & David McLaughlin, *Inflation Risks Getting Sticky as Big Firms Flex Pricing Power*, BLOOMBERG (Jan. 14, 2022), <https://www.bloomberg.com/news/articles/2022-01-14/inflation-risks-getting-sticky-as-big-firms-flex-pricing-power> (“‘The longer inflation lasts and the more widespread it is, the more air cover it gives companies to raise prices,’ [Barclays Plc global head of research Jeffrey] Meli said. ‘It feeds on itself.’”).

- 3) What industry characteristics are likely to facilitate and potentially mask price gouging?
- 4) Is there any reason that, in the presence of abnormal disruptions, it would not be feasible to limit price increases for covered goods and services to the amount of cost increases?
- 5) What role does profit play in determining whether price gouging has occurred? Should manufacturers, distributors, and retailers of covered goods and services be permitted to increase their profit margins during a period of abnormal market disruptions through price increases?
- 6) What role does dynamic pricing play in price gouging and in masking the ability to detect price gouging?
- 7) Firms at every stage in the supply chain routinely sell the same product at different prices. When it comes to a big price jump during a disruption and measuring gross disparity, which pre-disruption price best captures the jump in price? What types of sales—and to whom—should be included in evaluating the pre-disruption price?
- 8) What mechanisms should the Office offer to allow retailers to report price gouging by other firms in the supply chain? What other steps can be taken to improve the ability detect price gouging?
- 9) To what extent do competing stakeholders in a distribution chain subject to GBL 396-r exchange information on pricing, inputs, inventory, or the source or quantity of supply? How does information flow impact potential price gouging, or the ability to detect it? Are there contractual arrangements between stakeholders that could reduce transparency around potential price gouging or create a fear of retaliation for cooperating with law enforcement?
- 10) Sometimes new products develop in response to the reasons for the market disruption, as with the COVID-19 at-home testing example mentioned above. How should price gouging be measured for a product that did not exist prior to the disruption?

B. Unconscionably extreme

- 11) GBL 396-r prohibits the sale of covered goods or services at “unconscionably excessive price[s]” during periods of abnormal market disruption. One of the tests for finding that a price was unconscionably excessive is that “that the amount of the excess in price is unconscionably extreme.” Is it appropriate to set thresholds at which price increases could give rise to a presumption of “unconscionably extreme” excesses in price? If so, which benchmarks should be used? Should those thresholds be absolute measures or relative to historical or other market trends?
- 12) What methods of measurement are appropriate to calculate any threshold for a presumption that an excess in price is “unconscionably extreme”?

- 13) If a percentage increase from the benchmark is used as one of the indicators, what percentage increase is unconscionable?
- 14) In some contexts, such as automobile sales or medical devices, even a small percentage price increase can be devastating during a disruption. Should the absolute cost of the good or service inform the level at which price increases are considered unconscionably extreme? Should “unconscionability” be treated differently for goods or services that have a high absolute cost and are unquestionably essential?

C. Unfair Leverage or Unconscionable Means

- 15) GBL 396-r prohibits the sale of covered goods or services at an “unconscionably excessive price” during periods of abnormal market disruption. One of the tests for finding that a price was unconscionably excessive is that “there was an exercise of unfair leverage or unconscionable means.” How should “unfair leverage” be defined? What factors should inform the determination of whether a price increase is due to an exercise of unfair leverage?
- 16) When a firm increases price through the exercise of unfair leverage, should the percentage price increases creating a presumption of illegality be lower?
- 17) Is it appropriate to consider industry concentration when defining unfair leverage, and if so, what levels of concentration create a presumption of leverage?
- 18) If levels of concentration create a presumption of leverage, how should the relevant industry for determining the level of concentration be defined?
- 19) Are there characteristics other than concentration that would allow a firm to exercise “unfair leverage”? What information would be helpful to determine whether a company has the ability to exercise “unfair leverage”?
- 20) Are there particular forms of conduct, such as exclusive dealing arrangements, that might give rise to a presumption of, or be part of a test for, unfair leverage?
- 21) Should “unconscionable means” be distinguished from “unfair leverage,” and if so, how?
- 22) Some market participants have reportedly stockpiled goods to be able to sell these products at higher prices when other sellers ran out of inventory. Can this type of stockpiling constitute the exercise of unfair leverage or unconscionable means, and if so, under what conditions?
- 23) Some industries have reportedly charged different prices to customers and patients for the same good or service during the pandemic. Can first degree price discrimination—where the seller charges similar customers a different price for the same good or service—

constitute the use of unfair leverage or unconscionable means, and if so, under what conditions?

- 24) Many industries engage in dynamic pricing, making it difficult to know what a “price” is for a particular good or service. Can dynamic pricing constitute the use of unfair leverage or unconscionable means, and if so, under what conditions?

D. Industry Specific Questions

- 25) Several industries that are in the supply chain for covered goods experienced significant increases in prices and/or profitability since the beginning of the pandemic, including shipping, meat packing, lumber and other homebuilding products, rental housing, grocery stores, online platforms, and basic household goods like diapers. What information about these industries, including the nature of their supply chains, could help shed light on whether price gouging is occurring in these industries? How are prices set in each of these industries? Are there features of these industries that would make price gouging likely and/or would mask price gouging?
- 26) GBL 396-r particularly mentions medical supplies and services. What particular medical goods and services have features that might make price gouging more likely and/or mask price gouging?
- 27) During the pandemic there have been large spikes in energy prices and profitability. What features of energy production and distribution might make price gouging more likely and/or mask price gouging?
- 28) What other industries have features that make them prone to price gouging? What industries may have engaged in price gouging during the COVID-19 pandemic, and what can we learn from studying them?