

## **New York City Department of Consumer Affairs**

### **Notice of Adoption**

Notice of Adoption of a new permanent rule declaring as unconscionable the practice of price gouging goods and services that are essential to health, safety and welfare, or are marketed or advertised as being essential to health, safety and welfare, during a declared State of Emergency in the City of New York.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of Consumer Affairs by Section 2203(f) of the New York City Charter and Sections 20-701 and 20-702 of the New York City Administrative Code, and in accordance with the requirements of Section 1043 of the New York City Charter, that the Department is promulgating a new rule declaring the practice of price gouging unconscionable.

This rule was proposed and published on May 13, 2020. A public hearing was held on June 12, 2020.

Pursuant to New York City Charter Section 1043(f)(1)(c), this rule shall become effective immediately.

### **Statement of Basis and Purpose of Rule**

On March 15, 2020, the Department of Consumer Affairs (“DCA” or “Department”) promulgated an emergency rule pursuant to section 1043(i) of chapter 45 of the New York City Charter (the “Emergency Rule”) declaring as unconscionable the practice of price gouging certain personal and household goods and services. The Emergency Rule added a new section 5-42 of chapter 5 of title 6 of the Rules of the City of New York and amended the penalty schedule in section 6-47 of chapter 6 of title 6.

The Department is now adding a new permanent rule declaring as unconscionable the practice of price gouging goods and services that are essential to health, safety and welfare, or are marketed or advertised as being essential to health, safety and welfare during a declared State of Emergency in the City of New York.

New York City Administrative Code § 20-701(b) permits DCA to declare as unconscionable:

Any act or practice in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental or loan of any consumer goods or services, or in the extension of consumer credit, or in the collection of consumer debts which unfairly takes advantage of the lack of knowledge, ability, experience or capacity of a consumer; or results in a gross disparity between the value received by a consumer and the price paid, to the consumer's detriment[.]

Price gouging occurs when a merchant takes advantage of an abnormal disruption in the marketplace and charges excessive prices, taking advantage of the consumer's inability to bargain or seek a better price, resulting in a “gross disparity between the value received by a consumer and the price paid.” Such marketplace disruptions often occur during a State of Emergency. This rule assists in protecting consumers when they are at their most vulnerable.

The permanent rule declares price gouging conduct unconscionable and aligns New York City with many jurisdictions across the country that prohibit price gouging in emergency circumstances, including New York State. The rule includes an illustrative list of goods that are essential to health, safety or welfare, and could therefore be subject to price gouging. The rule also establishes a threshold for prohibited pricing of ten percent above the price at which consumers in New York City could obtain such goods or services 30 to 60 days prior to the declaration of a State of Emergency in the City of New York. This is similar to the standard used by several other jurisdictions, including the states of New Jersey and California, in laws that prohibit price gouging.

To ensure that no merchant is penalized unfairly, the permanent rule provides a defense if the merchant can show that the price increase was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services. The permanent rule further provides an exemption for merchants who did not exploit the State of Emergency and charged the same price both 30 days prior to the declaration of a State of Emergency and during that State of Emergency.

The Emergency Rule added an entry for the new price gouging prohibition to the penalty schedule for consumer protection law violations found in section 6-47 of subchapter B of chapter 6 of title 6 of the Rules of the City of New York. This entry is included in the permanent rule.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of the Department, unless otherwise specified or unless the context clearly indicates otherwise.

### **Rule Amendment**

Section 1. Part 4 of subchapter A of chapter 5 of Title 6 of the Rules of the City of New York is amended by adding a new section 5-42, to read as follows:

#### **§ 5-42 Unlawful Price Gouging.**

##### (a) Definitions.

“Covered goods or services.” The term “covered goods or services” means goods or services that are essential to health, safety or welfare, or are marketed or advertised as such, including but not limited to staple consumer food items such as milk, eggs and bread, goods or services used for emergency cleanup, or emergency supplies such as water, flashlights, radios, batteries, candles, blankets, soaps, diapers, toiletries, medical supplies such as medications, bandages, gauze, isopropyl alcohol, medical masks, and antibacterial products, or gasoline or other motor fuels.

“Excessive price.” The term “excessive price” means 10 percent or more above the price at which the same or similar good or service could have been obtained by a buyer in the City of New York 30-60 days prior to the declaration of a state of emergency.

“Merchant.” The term “merchant” means a seller, lessor, or creditor or any other person who makes available either directly or indirectly, goods, services or credit, to consumers. “Merchant”

includes manufacturers, wholesalers and others who are responsible for any act or practice prohibited by this subchapter.

(b)(1) It is an unconscionable trade practice for a merchant to sell or offer for sale covered goods or services at an excessive price during a declared state of emergency in the City of New York.

(2) *Exceptions.* A merchant is permitted to sell or offer for sale covered goods or services at an excessive price if such merchant:

(i) has increased its price of such goods or services to an excessive price as a direct result of costs imposed on such merchant by the supplier of such goods or services, or such increase in the price of such goods or services is directly attributable to additional costs for labor or materials used to provide the goods or services, provided that the increase charged to the buyer is comparable to the increase incurred by the merchant; or

(ii) sold or offered for sale such covered goods or services to buyers in the City of New York at an excessive price 30 days prior to the declaration of a state of emergency and such merchant has not increased the price of such goods or services during the state of emergency, or in the 30 days prior to such declaration, except in accordance with subdivision (i).

(3) Each sale or offer for sale in violation of this rule constitutes a separate violation.

Section 2. Section 6-47 of subchapter B of chapter 6 of Title 6 of the Rules of the City of New York is amended, to read as follows:

### **§ 6-47 Consumer Protection Law Penalty Schedule.**

All citations are to Title 20 of the Administrative Code of the City of New York or Title 6 of the Rules of the City of New York.

Unless otherwise specified, the penalties set forth for each section of law or rule shall also apply to all subdivisions, paragraphs, subparagraphs, clauses, items, or any other provision contained therein. Each subdivision, paragraph, subparagraph, clause, item, or other provision charged in the Notice of Violation shall constitute a separate violation of the law or rule.

For the fine amounts marked by a single asterisk, if the respondent timely submits the appropriate proof of having cured a first-time violation, the respondent will not be subject to a civil penalty pursuant to Local Law 153 of 2013.

Pursuant to Section 20-703(b) of the Administrative Code of the City of New York, the knowing violation of any provision of subchapter 1 of chapter 5 of title 20 of the Administrative Code of the City of New York or of any rule promulgated thereunder is subject to a maximum penalty of \$500.

Unless otherwise specified by law, a second or third or subsequent violation means a violation by the same respondent, whether by pleading guilty, being found guilty in a decision, [or] entering into a settlement agreement for violating the same provision of law or rule, within two years of the prior violation(s).

Citation	Violation Description	First Violation	First Default	Second Violation	Second Default	Third and Subsequent Violation	Third and Subsequent Default
Admin Code § 20-700	Engaged in an unlawful deceptive or unconscionable trade practice	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-23	Failure to meet the requirement(s) for layaway plans	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-24	Failure to meet requirement(s) for credit card limitations	\$260*	\$350*	\$315	\$350	\$350	\$350
6 RCNY § 5-32	Failure to meet the requirement(s) for documentation of transactions	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-36	Failure to meet the requirement(s) for sale of used items	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-37	Failure to comply with disclosure of refund policy requirements	\$260*	\$350*	\$315	\$350	\$350	\$350
6 RCNY § 5-39	Failure to meet the requirements for cancellation of home appointment	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-40	Improper limit or disclaimer of liability for negligence	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-40(e)	Improper posting of sign that business is not liable for negligence	\$260*	\$350*	\$315	\$350	\$350	\$350
6 RCNY § 5-41	Collected sales tax on sale of good or service not subject to such tax under Article 28 of the NYS Tax Law or rule and regulations promulgated thereunder	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-42	Violation of the prohibition on price gouging	\$350	\$350	\$350	\$350	\$350	\$350
6 RCNY § 5-46	Failure to meet the requirement(s) for a car rental business	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-46(d)	Failure to post notice of consumer protection law	\$260*	\$350*	\$315	\$350	\$350	\$350
6 RCNY § 5-47	Failure to meet the requirement(s) for jewelry sellers and appraisers	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-51	Failure to meet the requirement(s) for retail sale of gasoline	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-54	Failure to meet the requirement(s) for repairs of consumer goods	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-55	Failure to meet the requirement(s) for meat and poultry advertising	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-56	Failure to meet the requirement(s) for window gates	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-57	Failure to meet the requirement(s) for utility bill payments	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-58	Improper offer of sale of food in damaged containers	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-59	Improper imposition of restaurant surcharges	\$260	\$350	\$315	\$350	\$350	\$350

6 RCNY § 5-60	Failure to meet the requirement(s) for franchises	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-61	Failure to meet the requirement(s) for public performance seats	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-63	Failure to meet the requirement(s) for catering contracts	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-68	Failure to meet the requirements for dealers at flea markets	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-69	Failure to meet the requirements of blood pressure reading services	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-70	Failure to meet the requirements for retail service establishments	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-73	Failure to meet the requirement(s) for the sale of box cutters	\$350	\$350	\$350	\$350	\$350	\$350
6 RCNY § 5-75	Failure to post the Buyer's Guide when selling or offering to sell any used automobile	\$260	\$350	\$315	\$350	\$350	\$350
6 RCNY § 5-87 through 6 RCNY § 5-103	Prohibited conduct in offering sales or discounts and related recordkeeping requirements	\$260	\$350	\$315	\$350	\$350	\$350

**Required Finding Pursuant to New York City Charter Section 1043(f)(1)(c)**

IT IS HEREBY CERTIFIED that this rule, which declares as unconscionable the practice of price gouging of personal and household goods and services during a declared State of Emergency in the City of New York, is immediately necessary for the Department of Consumer Affairs (DCA) to continue to protect consumers during the ongoing COVID-19 State of Emergency and shall become effective immediately with this Notice of Adoption under Charter section 1043(f)(1)(c).

Pursuant to the emergency price gouging rule promulgated on March 15, 2020 (“Emergency Rule”), DCA has been engaged in extensive enforcement efforts with merchants across New York City that are charging excessive prices on goods used or marketed to limit the spread of COVID-19. DCA has received over 11,000 complaints of price gouging during the COVID-19 State of Emergency and has issued more than 600 summonses against businesses engaged in unlawful price gouging of products like face masks, hand sanitizer, and disinfectant wipes.

The Emergency Rule expires on July 12, 2020. Without immediate implementation of the permanent price gouging rule, there will be a window where neither the Emergency Rule nor the permanent rule will be in effect and DCA will temporarily lack the authority to protect consumers from these pervasive and ongoing predatory practices. During this window, merchants could raise prices with impunity and prevent consumers from accessing goods and services that control the spread of COVID-19, with the likely consequence of increased and avoidable exposure to this communicable disease.

IT IS HEREBY CERTIFIED that a substantial need exists for this rule, to continue enforcement against ongoing price gouging during the current State of Emergency due to COVID-19.

Dated: June 24, 2020

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LORELEI SALAS  
COMMISSIONER,  
DEPARTMENT OF CONSUMER AFFAIRS

APPROVED:

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BILL DE BLASIO