

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: February 15, 2022

SUBJECT: Report on Bill 24-126, “Seasonal Pricing and Price Gouging Amendment Act of 2022”

The Committee of the Whole, to which Bill 24-126, the “Seasonal Pricing and Price Gouging Amendment Act of 2022”¹ was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

On March 1, 2021, Bill 24-126, the “Seasonal Pricing Price Gouging Amendment Act of 2021” was introduced by Chairman Mendelson. The Bill would allow car rental companies to utilize seasonal pricing models during a public health emergency or public emergency declared by the Mayor without running afoul of the District’s consumer protection statutes. It would also codify language from COVID-19 emergency legislation directing the Courts to assess the penalties for price gouging or stockpiling during a public health emergency or public emergency.

The Natural Disaster Consumer Protection Act of 1992

The Natural Disaster Consumer Protection Act (D.C. Official Code § 28-4101 *et seq.*) was first introduced in June 1989 in response to a severe thunderstorm that struck Northwest D.C. and

¹ The title of the bill has been changed slightly from the title as introduced.

caused in 28 million dollars in damage.² After the storm, businesses specializing in tree cutting and removal charged many customers three or four times the normal rate,³ leading then Councilmember John Wilson (Ward 2) to introduce emergency legislation to penalize price gouging in the event of an emergency declaration by the Mayor.⁴ Two years later, the Council approved a permanent version of the bill.⁵

Under the current law, price gouging is defined as charging more than the “normal average retail price” for any merchandise or service sold during a state of emergency resulting from a natural disaster.⁶ The code defines “normal average retail price” as:

- In the case of services, not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area during the 90-day period prior to a state of emergency; or
- In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period prior to a state of emergency.⁷

Two hypothetical examples illustrate how this works in practice. In the first example, a medical services company offers home medical visits for urgent care, preventative care, and long-term care. In the 90-day period prior to a state of emergency, the average cost for these services in the Washington Metropolitan area was \$175. During a state of emergency, the company could charge up to \$192.50. Any company charging beyond that price would be in violation of District law. In the second example, a grocery store sells goods such as toilet paper. The average wholesale cost before a state of emergency was a dollar, and the grocery store had a retail markup of 15%, for a total cost of \$1.15 per roll. The wholesale price increases to \$1.55 during an emergency due to an increase in demand and constrain in supply. If the grocery store charges more than \$1.78 per roll, it would be in violation of the law.⁸ A violation in either example would subject to the company to a fine of up to \$1,000 and potential revocation or suspension of licenses.⁹

Table 1. Pricing Examples

	Example 1	Example 2
Type of Product	Service	Merchandise
Product Offered	Medical House Calls	Roll of Toilet Paper
Average Cost Pre-Emergency	\$175	N/A
SOE Highest Allowable Price	\$192.50	N/A
Retail Markup Pre-Emergency	N/A	15%
Emergency Retail Markup	N/A	15%

² “Flag Day Storm, 6/14/89,” WUSA-9, June 14, 2015 (<https://www.wusa9.com/article/weather/tenacious-toppers-blog-flag-day-storm-61489/65-203202080>).

³ Anne Swardson, “Topped Trees a Windfall for Contractors, Hotels,” *The Washington Post*, June 18, 1989, pg. A16.

⁴ “Wilson Drafts Bill to Prevent Price Gouging in Disasters,” *The Washington Post*, June 23, 1989, pg. C3.

⁵ D.C. Law 9-80, 39 DCR 675.

⁶ D.C. Official Code § 28-4102(a).

⁷ D.C. Official Code § 28-4101(2)(A) and (B).

⁸ The store also could not increase their retail markup if wholesale prices decreased.

⁹ D.C. Official Code § 28-4103.

Changes to the Law During the COVID-19 Pandemic

In the first few weeks of the COVID-19 pandemic, consumers across the country rushed to buy household necessities as cities, counties, and states instituted broad public-health driven restrictions on business operations and social activities.¹⁰ While most of this “panic buying” was not nefarious, bad actors took advantage of the situation by stockpiling crucial consumer goods and selling these products for many times their average cost.¹¹ Only 15 days after the Mayor declared a public health emergency in the District, the Office of Attorney General had received more than 25 complaints about price gouging in the District.¹² By mid-May, the number of complaints related to price gouging in the District totaled 157.¹³ Given the nature and volume of these complaints, the Council included language in the Coronavirus Support Emergency Amendment Act of 2020 (Act 23-326) that made three updates to the Natural Disaster Consumer Protection Act of 1992, one of which is included in Bill 24-126 as introduced.

First, the Act amended language in D.C. Official Code §§ 28-4101(2) and 28-4102(a) to ensure that the prohibition against price gouging is applicable during a public health emergency declared by the Mayor pursuant to D.C. Official Code § 7-2304.01.¹⁴ Before this change, the prohibition was only applicable during a state of emergency resulting from a natural disaster, which the law defines as a “... disaster, catastrophe, or emergency, including fire... flood, earthquake, storm, or other serious act of nature...”¹⁵ Second, the Act inserted a new Section 28-4102.01 prohibiting the stockpiling of any merchandise that has been declared by the Mayor, Department of Health, Homeland Security and Emergency Management Agency, or the federal government as necessary for first responders or others following a natural disaster or public health emergency declaration, necessary to maintain supply chains of commerce, or subject to rationing. Finally, the Act mandated that when the Attorney General brings a civil action for violating the statute, the Court must assess the maximum penalty authorized by D.C. Official Code § 28-3909 for each violation, which is \$10,000.¹⁶ In the permanent version of the law, there is no language dictating the size or scope of penalties in civil actions brought against violators by the Office of Attorney General. Bill 24-126 as introduced includes the penalty provisions.

In addition to the amendments made by Act 23-326, the Council made an additional change to the law via the Coronavirus Support Emergency Amendment Act of 2021 (Act 24-30). The Act provided a definition of “normal average retail price” for rental vehicles that caps the cost of a rental car at the average price a rental car was leased during the same week of the same month of the prior year in the Washington Metropolitan Area. This allows rental car companies to continue to use seasonal pricing models during an emergency or public health emergency without being

¹⁰ See, for instance, Corina Knoll, “Panicked Shoppers Empty Shelves as Coronavirus Anxiety Rises,” *The New York Times*, March 16, 2020 (<https://www.nytimes.com/2020/03/13/nyregion/coronavirus-panic-buying.html>).

¹¹ Michael Levenson, “Price Gouging Complaints Surge Amid Coronavirus Pandemic,” *The New York Times*, March 27, 2020 (<https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html>).

¹² “AG Racine Sends Cease-and-Desist Letters to Stop Price Gouging by District Sores and Online Sellers,” Office of Attorney General, March 26, 2020 (<https://oag.dc.gov/release/ag-racine-sends-cease-and-desist-letters-stop>).

¹³ “Coronavirus (COVID-19) Consumer Complaint Report: March-May 2020,” Office of Attorney General, May 15, 2020 (<https://oag.dc.gov/sites/default/files/2020-05/COVID-19-Consumer-Complaint-Report-05-15-20-Final.pdf>).

¹⁴ D.C. Act 23-326, Section 306(b).

¹⁵ D.C. Official Code § 28-4101(1).

¹⁶ D.C. Act 23-326, Section 306(d)(2).

penalized. Many rental car companies use seasonal pricing models to determine the cost of a vehicle. In general, rental vehicle costs are higher in the summer due to increases in travel and lower in the winter.¹⁷ This language was included in Bill 24-126 as introduced.

Amendments to Bill 24-126

The Committee Print amends Bill 24-126 in several ways. First, the Print amends subparagraphs (A) and (B) in Section 28-4101(2), and Section 28-4102(a), to make the declaration of a public health emergency by the Mayor a triggering event for the applicability of anti-price gouging and anti-stockpiling provisions. This language was inadvertently left out of the introduced version of Bill 24-126.

Second, the Print defines “normal average retail price” for a rental vehicle as not more than 10% more than the price at which a rental vehicle was leased or advertised to be leased during the same week of the same month of the prior year in the Washington Metropolitan Area. Additionally, the Print defines “normal average retail price” for hotels with at least a 95% occupancy rate as not more than 10% more than the price at which a room was booked or advertised to be booked during the same week of the same month of the most recent year for which there was an average hotel room occupancy of 95% in the Washington Metropolitan Area. These definitions ensure that rental vehicle companies and hotels are able to consider seasonality and demand for services when establishing prices during an emergency or public health emergency. The 10% threshold for both definitions is consistent with existing language in § 28-4101(2). The Committee Print also includes a definition of “Washington Metropolitan Area” that matches the current definition used by the United States Office of Budget and Management.

Third, the Committee Print includes language from the Coronavirus Support Emergency Amendment Act of 2020 that prohibits people from buying goods in quantities greater than those specific by the Mayor or the federal government if such goods are declared necessary for first responders or others during a state of emergency or after declaration of a public health emergency, necessary to maintain supply chains of commerce, or subject to government-ordered rationing. This language is identical to what the Council approved in prior emergency legislation, including Act 23-326.

Fourth, the Committee Print would not *require* the maximum penalty be assessed in civil actions brought by the Office of Attorney General. Instead, it provides the Superior Court with a range of \$1,000 to \$10,000 per violation, consistent with D.C. Official Code §§ 28-3909(b) and 28-4103. The actual amount assessed for a violation will depend on the severity of the violation in question. However, the Print requires the Court to assess the maximum penalty if the violations involve services or goods that the Mayor or the federal government has declared to be necessary for first responders or others during a natural disaster or public health emergency, necessary to maintain supply chains of commerce during a natural disaster or public health emergency, or subject to government-ordered rationing. Providing for a penalty range rather than requiring the maximum penalty be assessed for any violation is an approach consistent with price gouging

¹⁷ See, for instance, Joshua Fruhlinger, “Here’s how rental car prices rise and fall,” *The Business of Business*, December 27, 2018 (<https://www.businessofbusiness.com/articles/rental-car-price-trends/>).

statutes in most other states, as shown in Table 2. No state currently requires the maximum penalty in all cases.

Table 2. Price Gouging Statute Civil Penalties¹⁸

	Financial Penalty Range	Penalty Per Violation
Alaska ¹⁹	\$1,000 - \$25,000	Yes
Arkansas ²⁰	Up to \$10,000	Yes
Delaware ²¹	Up to \$10,000	Yes
Florida ²²	Up to \$1,000	Yes
Hawaii ²³	\$500 - \$10,000	Yes
Indiana ²⁴	Up to \$1,000	Yes
Kansas ²⁵	Up to \$10,000	Yes
Massachusetts ²⁶	Up to \$5,000	Yes
New Mexico ²⁷	Up to \$5,000	Yes
New York ²⁸	Up to \$25,000	Yes
North Carolina ²⁹	Up to \$5,000	Yes
Oklahoma ³⁰	Up to \$10,000	Yes
Oregon ³¹	Up to \$25,000	Yes
Pennsylvania ³²	Up to \$10,000	Yes
Rhode Island ³³	Up to \$1,000	Yes
Tennessee ³⁴	\$1,000 - \$5,000	Yes
Texas ³⁵	Up to \$10,000	Yes
Vermont ³⁶	Up to \$10,000	Yes
Virginia ³⁷	Up to \$2,500	Yes
West Virginia ³⁸	Up to \$5,000	Yes

Finally, the Committee Print includes language that clarifies that when wholesale prices decrease, it is not price gouging if the retailer does not increase their prices for merchandise. Under the current statute, a retailer could face civil penalties for not lowering the retail price of the merchandise in question if the wholesale price drops enough to make their retail markup higher

¹⁸ Not all states have price gouging statutes.

¹⁹ Alaska Statutes § 45.50.551(b).

²⁰ Arkansas Statutes § 4-88-113.

²¹ 6 Delaware Code § 2522(b).

²² Florida Statutes § 501.164.

²³ Hawaii Revised Statutes § 480-3.1

²⁴ Indiana Code § 4-6-9.1-5.

²⁵ Kansas Statutes Ann. § 50-636(a) and § 50-677.

²⁶ Massachusetts General Laws c. 93A § 4.

²⁷ New Mexico Statutes § 57-12-2.

²⁸ New York Gen. Bus. Law § 396-r(4).

²⁹ North Carolina General Statutes § 75-15.2.

³⁰ Oklahoma Statutes, Title 15 § 761.

³¹ Oregon Revised Statutes § 646.642.

³² Pennsylvania P.L. 1210, No. 133 § 5(a).

³³ Rhode Island General Laws § 6-13-21.

³⁴ Tennessee Code § 47-18-5104.

³⁵ Texas Business and Commerce Code § 17.47(c).

³⁶ Vermont Statutes Ann. § 2461.

³⁷ Virginia Code § 59.1-206.

³⁸ West Virginia Code § 46A-7-109.

than it was before an emergency or public health emergency. This is contrary to the purpose of price gouging statutes, which is to protect consumers from unreasonable price increases when there is a shortage of critical merchandise in emergency situations. If there is no shortage, or there is a glut of merchandise—as would be the case in circumstances where the wholesale price of merchandise drops—the price gouging statute need not apply.

The penalty provisions would not be applicable prior to February 15, 2022, to ensure that this does not impact any pending litigation.

Conclusion

Due to the experience of the District during the COVID-19 pandemic, updating the District’s price gouging law is imperative. The Committee Print for Bill 24-126 does this in several ways, including making a public health emergency an event under which price gouging would be prohibited, prohibiting stockpiling of critical resources, and setting appropriate penalties for a violation of the law. These changes will ensure that the District is better prepared to address price gouging and stockpiling in the future. As such, the Committee recommends adoption of the Print for Bill 24-126.

II. LEGISLATIVE CHRONOLOGY

- | | |
|-------------------|--|
| March 1, 2021 | Bill 24-126, the “Seasonal Pricing Price Gouging Amendment Act of 2021” is introduced by Chairman Mendelson. |
| March 2, 2021 | Bill 24-126 is “read” at a legislative meeting; on this date the referral of the bill to the Committee of the Whole is official. |
| March 5, 2021 | Notice of Intent to Act on Bill 24-126 is published in the <i>District of Columbia Register</i> . |
| October 8, 2021 | Notice of a Public Hearing on Bill 24-126 is published in the <i>District of Columbia Register</i> . |
| November 29, 2021 | The Committee of the Whole holds a public hearing on Bill 24-126. |
| February 1, 2022 | The Committee of the Whole marks-up Bill 24-126. |

III. POSITION OF THE EXECUTIVE

The Executive did not provide comments or testimony on Bill 24-126.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee of the Whole did not receive any testimony or comments from Advisory Neighborhood Commissions regarding Bill 24-126.

V. SUMMARY OF TESTIMONY

The Committee of the Whole held a public hearing on two bills, including Bill 24-126, on Monday, November 29, 2021. The testimony summarized below pertains to Bill 24-126. Copies of all written testimony are attached to this report.

Ellen Valentino, testifying on behalf of the Mid-Atlantic Petroleum Distributors, testified in opposition to the bill as drafted. Ms. Valentino requested that the Committee consider amending the language to give courts discretion on the penalty amount, rather than requiring the maximum penalty for all violations.

Kurk McCauley, testifying on behalf of the WMD Service Station Assn., testified in opposition to the bill as drafted. Mr. McCauley echoed the remarks of Ms. Valentino.

Rob Garagiola, with Compass Government Relations testifying on behalf of Enterprise Rent-A-Car, testified in support of the bill with minor amendments.

The Committee has received no other comments or testimony regarding Bill 24-126.

VI. IMPACT ON EXISTING LAW

Bill 24-126 amends Title 28 of the District of Columbia Official Code to prohibit price gouging and stockpiling during an emergency that is a result of a natural disaster or a public health emergency declared pursuant to § 7-2304.01. The bill includes a new definition for “normal average retail price” for rental vehicles, which is defined as not more than 10% of the average price in the same week of the same month of the prior year in the Washington Metropolitan Area. The bill authorizes enforcement of § 28-4102(a) or § 28-4102.01 by the Office of Attorney General via civil actions and requires the Court to assess a penalty of \$1,000 to \$10,000 for each violation if the court finds that a person has violated the law. The bill will require the Court to assess \$10,000 per violation if the violation involves merchandise or services that the Mayor or the federal government have declared are necessary for first responders or other people following a natural disaster or a declaration of a public health emergency pursuant to § 7-2304.01, necessary to maintain supply chains of commerce during a natural disaster or public health emergency or subject to government-ordered rationing.

VII. FISCAL IMPACT

The attached February 14, 2022 fiscal impact statement from the District's Chief Financial Officer states that funds are sufficient in the fiscal year 2022 through fiscal year 2025 budget and financial plan.

VIII. RACIAL EQUITY IMPACT

The attached February 14, 2022 Racial Equity Impact Assessment from the Council Office on Racial Equity concludes that Bill will likely improve economic outcomes for Black residents, Indigenous residents, and other residents of color in the District.

IX. SECTION-BY-SECTION ANALYSIS

Section 1

Short title.

Section 2

- (a) Amends the table of contents to include a new section designation.
- (b) Amends section 28-4101(2)(C) to define “normal average retail price” for rental vehicles and hotel rooms.
- (c)(1) Amends section 28-4102(a) so that a declaration of a public health emergency issued by the Mayor is a triggering event under the law.
- (2) Adds a new subsection (c) to 28-4102 to clarify certain actions by petroleum product distributors are not violations of the price gouging statute.
- (d) Creates a new section 28-4102.01 to prohibit the stockpiling of certain merchandise following a natural disaster or public health emergency declaration.
- (e)(1) Amends section 28-4103 to include a reference to new section 28-4102.01.
- (2) Adds a new subsection in section 28-4103 to provide for a civil penalty of \$1,000 to \$10,000 per violation, depending on the severity of the violations, when the Court finds a person has violated the law. The Court must assess \$10,000 per violation in certain circumstances.

Section 3

Fiscal impact statement.

Section 4

Effective date.

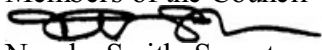
X. COMMITTEE ACTION

XI. ATTACHMENTS

1. Bill 24-126 as introduced.
2. Written Testimony.
3. Fiscal Impact Statement for Bill 24-126.
4. Legal Sufficiency Determination for Bill 24-126.
5. Racial Equity Impact Assessment for Bill 24-126.
6. Comparative Print for Bill 24-126.
7. Committee Print for Bill 24-126.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council
Date : Monday, March 1, 2021
Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Monday, March 01, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Comprehensive Cannabis Legalization and Regulation Act of 2021", B24-0118

INTRODUCED BY: Chairman Mendelson and Councilmembers Pinto, Henderson, Allen, McDuffie, Nadeau, Cheh, Bonds, and Lewis George

The Chairman is referring this legislation sequentially to the Committee on Judiciary and Public Safety, the Committee on Business and Economic Development, and the Committee of the Whole.

Attachment

cc: General Counsel
Budget Director
Legislative Services

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A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Title 28 of the District of Columbia Official Code to allow for alternative calculation based on a seasonal pricing model to protect consumers from price gouging; and to make a public health emergency a triggering event for the prohibition against price gouging.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Seasonal Pricing Price Gouging Amendment Act of 2021”.

Sec. 2. Title 28 of the District of Columbia Official Code is amended as follows:

(a) Section 28-4101 is amended by adding a new subparagraph (2)(C) to read as follows:

“(C) Notwithstanding subsection (2)(A) or (B) otherwise to the contrary:

“(i) For calendar year 2021, the “normal average retail price” means for a rental vehicle as defined in § 50-1505.01(8) as the average price at which a rental vehicle was leased during the same week of the same month in 2019 in the Washington Metropolitan Area; and

“(ii) For calendar year 2022 and thereafter, the “normal average retail price” means for a rental vehicle as defined in § 50-1505.01(8) the price at which a

35 rental vehicle was leased during the same week of the same month of the prior year in the
36 Washington Metropolitan Area.”

37 (b) Section 28-4103 is amended as follows:

38 (1) Strike the phrase “§ 28-4102(a)” wherever it appears and insert the phrase “§
39 28-4102(a) or § 28-4102.01” in its place.

40 (2) A new subsection (c) is added to read as follows:

41 “(c) When the Office of the Attorney General brings a civil action for any violation of §
42 28-4102(a) or § 28-4102.01 under the authority granted in § 28-3909, the maximum penalty
43 authorized by § 28-3909 shall be assessed for each such violation.”.

44 Sec. 3. Fiscal impact statement.

45 The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact
46 statement required by section 4a of the General Legislative Procedures Act of 1975, approved
47 October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

48 Sec. 4. Effective date.

49 This act shall take effect following approval by the Mayor (or in the event of veto by the
50 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
51 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
52 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(1)), and publication in the District of
53 Columbia Register.

November 29, 2021

Chairman Mendelson
Council of the District of Columbia, Committee of the Whole
1350 Pennsylvania Avenue,
Washington, DC, 20004

2273 Research Blvd
Suite 700
Rockville, MD 20850
301.670.8649
enterpriseholdings.com

**RE: Bill 24-126, Seasonal Pricing Price Gouging Amendment Act of 2021
SUPPORT WITH AMENDMENT**

Chairman Mendelson and Committee of the Whole,

On behalf of Enterprise Rental Cars (Enterprise), I am writing in support of B24-126 with amendment, which would codify, and make permanent, price gouging provisions from “COVID-19 Response Supplemental Temporary Amendment Acts of 2020 & 2021.”

Enterprise thanks the Chairman and the Council for including the “Seasonal Pricing Provisions” in the temporary COVID-19 Response Acts of 2020 and 2021. The following outlines circumstances surrounding the price gouging provisions during a public health emergency and the request to include amendments to B24-126 to mirror codified provisions related to “10% discretionary pricing.” Enterprise respectfully asks for a favorable with amendments report on B24-126 as set forth in the enclosure.

Enterprise has six locations in Washington, DC, with over 100 employees. In addition, during the most recent fiscal year, Enterprise Holdings has generated over \$2.1 million in local tax revenues for the District and has donated over \$260,000 to D.C. charities, including the Capital Area Food Bank, Children’s Hospital Foundation, and Greater Washington Urban League.

“Seasonal Pricing” Model. As you know, Enterprise, like other rental car companies, uses a “seasonal pricing” model for pricing its rental cars. In the summer months, when demand is greater, rental car pricing is generally higher. However, in the winter months, when demand is low, rental car pricing is discounted.

D.C. Price Gouging Law. The District has had a long-standing price-gouging law, which is set forth in Title 28, Chapter 41 of the D.C. Code.

It originally provided that if a “natural disaster” is declared, then it is unlawful “to charge more than the normal average retail price for any merchandise or services sold” (§ 28-4102).

Under Section 28-4101(2), “normal average retail price” is defined as:

(A) In the case of services, **not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area** during the 90-day period that preceded an emergency that resulted from a natural disaster, if an emergency is declared pursuant to § 28-4102(b); or

(B) In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the

Washington Metropolitan Area during the 90-day period that immediately preceded an emergency that resulted from a natural disaster, if an emergency has been declared pursuant to § 28-4102(b) (emphasis added).

COVID-19 Response Supplemental Temporary Amendment Acts of 2020 & 2021. As a result of passage of the “COVID-19 Response Supplemental Temporary Amendment Act of 2020,” which became effective on October 9, 2020, and subsequent passage of the “Act of 2021” (A24-062; with a sunset on February 4, 2022), language was added to the existing statute to prevent price gouging during a declared public health emergency. (See § 28-4102(a)).

(a) It shall be unlawful for any person to charge more than the normal average retail price for any merchandise or service sold during a public health emergency declared pursuant to § 7-2304.01, or during an emergency resulting from a natural disaster declared pursuant to subsection (b) of this section.

Declaration of Public Health Emergency. On March 11, 2020, Mayor Bowser declared a “Public Health Emergency” due to the COVID-19 pandemic (Mayor’s Order 2020-45). The Order has been extended on numerous occasions, including on October 7, 2021, which extended the public health emergency until January 7, 2022 (Mayor’s Order 2021-119). As a result, the price gouging prohibition will continue to be in place until at least January 7, 2022.

Issue. Many expect the COVID-19 pandemic to potentially continue into the summer and fall of 2022. It is likely that a public health emergency will be extended until such time. As a result, during the upcoming spring and summer of 2022, Enterprise will again be locked into its discounted pricing from the snapshot of December 2019 to March 2020 (the 90 days prior to the public health emergency declaration) if this language is not preserved in future iterations of temporary COVID-19 Omnibus legislation or if this bill were to not pass.

Solution. Enterprise supports the public policy goal of DC’s price gouging statute and the imposition of it during a public health emergency. Enterprise appreciates inclusion of the “seasonal pricing” language in the bill. However, we respectfully request modest modification to the existing bill language to mirror the 10% differential that has existed in current law prior to the pandemic.

Specifically, Enterprise would respectfully urge the Council to adopt the enclosed amendment to the statute to permit seasonal pricing with a provision to allow rental operators to charge no more than 10% of the price at which a vehicle was offered to be leased in the previous year. We believe this provision would mirror the 10% provision outlined in existing § 28-4101(2)(A). With recent inflation, supply chain issues, and other factors, rental car pricing has fluctuated quite a bit over this past year.

With our proposed amendment to the bill, Enterprise and other rental car companies would be able to price rental vehicles compared to the same week and month of the prior year for purposes of the 10% limit on pricing during a “public health emergency” or “natural disaster” rather than a static snapshot of the 90-days prior to such a declaration.

I thank you for the opportunity to address you and the Council on this issue and we respectfully ask for a Favorable with Amendments Report.

Sincerely,


John DeRose
Enterprise Holdings

The proposed amendments to B24-126 are as follows (*new language bold/underline/italic*):

§ 28–4101. Definitions.

For the purposes of this chapter, the term:

(1) “Natural disaster” means the actual or imminent consequence of any disaster, catastrophe, or emergency, including fire, other than a fire caused by human error or arson, flood, earthquake, storm, or other serious act of nature, which threatens the health, safety, or welfare of persons or causes damage to property in the District of Columbia.

(2) “Normal average retail price” means:

(A) In the case of services, not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area during the 90-day period that preceded an emergency that resulted from a natural disaster, if an emergency is declared pursuant to § 28-4102(b); or

(B) In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period that immediately preceded an emergency that resulted from a natural disaster, if an emergency has been declared pursuant to § 28-4102(b).

(C) Notwithstanding subparagraphs (A) or (B) of this paragraph otherwise to the contrary:

(i) For calendar year 2021, the “normal average retail price” means, for a rental vehicle as defined in § 50-1505.01(8), **NOT MORE THAN 10% MORE THAN** the average price at which a rental vehicle was leased **OR ADVERTISED TO BE LEASED** during the same week of the same month in 2019 in the Washington Metropolitan Area; and

(ii) For calendar year 2022 and thereafter, the “normal average retail price” means, for a rental vehicle as defined in § 50-1505.01(8), **NOT MORE THAN 10% MORE THAN** the price at which a rental vehicle was leased **OR ADVERTISED TO BE LEASED** during the same week of the same month of the prior year in the Washington Metropolitan Area.

(3) “Person” means a corporation, firm, agency, company, association, organization, partnership, society, joint stock company, or an individual.

To: Chairman Mendelson

From: Ellen Valentino, On behalf of the Mid-Atlantic Petroleum Distributors
ellen@mapda.com
1410-693-2226

Kurk McCauley, On behalf of the WMD Service Station Assn.
kmccauley@wmda.net
1301-775-0221

Date: November 29, 2021

Re: Bill 24-126 Seasonal Pricing Price Gouging Amendment Act of 2021

The bill as introduced does not provide any room for the court to consider/recognize mitigating circumstances in assessing the penalty.

The alternative language provides the court with discretion to assess penalties that are consistent with the gravity of the offense.

When the Office of the Attorney General brings a civil action for any violation of §28-4102(a) or §28-4102.01 under the authority granted in §28-3909, the court may assess an amount up to the maximum penalty authorized by §28-3909, provided that where: (i) there was no willful violation of §28-4102(a) or §28-4102.01; (ii) compliance with §28-4102(a) or §28-4102.01 would have resulted in an undue hardship to the person in violation due to circumstances caused by the emergency; or (iii) the violation was not the result of prices in excess of such person's prices in the 90 days immediately preceding the declaration of emergency, the maximum aggregate penalty shall not exceed \$10,000. The provisions of this subsection shall govern all civil penalties assessed after the effective date of this Act.

The court is authorized to assess civil penalties all the way up to the “maximum penalty authorized by §28-3909.” It also limits the maximum penalty to an aggregate amount of \$10,000 where the gravity of the offense is much lower than the typical violation. The lower limit would apply in only two sets of circumstances.

The first is where compliance with §28-4102(a) or §28-4102.01 would work an “undue hardship” to the violator. For example, the “markups” allowed by the law may not provide the

violator with enough cash to meet its overhead expenses (*e.g.*, rent, labor, principal and interest, utilities, and additional compliance costs). This could happen where the costs of doing business increase significantly as a result of a hurricane or a pandemic, such as those related to compliance with all the CDC and OSHA requirements that are put into place in a public health emergency. It could also happen where an emergency, like a pandemic, results in significantly decreased sales volumes. During the height of the COVID-19 pandemic, the various “lock-down” orders resulted in the number of drivers on the roads being significantly diminished, such that there were, at times, virtually no drivers on certain roads and very few drivers commuting to the District of Columbia (with the federal and DC governments locked down and non-essential businesses closed). Many gas stations were selling anywhere between one-third and one-half of the gallons they sold before the emergency. Other essential businesses had to curtail their hours of operation due to employee unavailability.

The second instance is where the violator simply did not increase its prices during the emergency. If the violator’s prices were the same as its prices before the emergency, there can be no argument that the violator took advantage of the emergency to raise its prices to excessive or unconscionable levels.

In both of these situations, the gravity of the offense is considerably less than the typical price gouging scenario where there is a shortage (of, say, hand sanitizer or toilet paper) and opportunists take advantage of the shortage to raise prices.

The two above-stated sets of circumstances are not a defense to the violation. In other words, they do not absolve the violator of liability. They simply reduce the maximum penalty in recognition of mitigating circumstances.

Attachment A

When the Office of the Attorney General brings a civil action for any violation of §28-4102(a) or §28-4102.01 under the authority granted in §28-3909, the court may assess an amount up to the maximum penalty authorized by §28-3909 after consideration of the gravity of the violation, provided that where: (i) compliance with §28-4102(a) or §28-4102.01 would have resulted in an undue hardship to the person in violation due to circumstances caused by the emergency; or (ii) the violation was not the result of prices in excess of such person's prices in the 90 days immediately preceding the declaration of emergency, the maximum aggregate of penalties and restitution shall not exceed \$10,000. This subsection shall apply to all penalties assessed and restitution awarded after the effective date hereof.

MAPDA/WMDA SUPPLEMENTAL SUBMISSION

The proposed legislation to make permanent the civil penalties provision D.C. Code §28-4103 is unfair. As the testimony of MAPDA and WMDA Service Station Assn. had already shown, a mandatory penalty in the maximum amount allowed by D.C. Code §28-3909 (which is \$10,000 per violation) would guarantee penalties so large as to put anyone out of business who violates the District's price gouging law, no matter how insignificant the violation and without regard to whether the price of the merchandise represents an increase over pre-emergency levels.

The proposed legislation should be amended to accomplish two purposes: (1) to provide the Superior Court with discretion to determine the amount of the penalty to be assessed; and (2) to preclude the imposition of a penalty, or lessen it considerably, where certain mitigating factors are present. To fully appreciate the amendment proposed by MAPDA and WMDA (enclosed as Attachment "A" hereto), a brief review of the District's price gouging law is appropriate. Our brief review should illustrate how the current law is counterproductive when it operates in an environment in which the law was never intended to apply.

Like the laws of other jurisdictions, the District's emergency price gouging law was intended to manage scarcity. In the case of natural disasters, like hurricanes or tornados, or public health emergencies, like the COVID-19 pandemic, certain essential goods are in short supply. In the case of COVID-19, for example, hand sanitizers, bleach, masks, surgical gloves and other items, were scarce. The fear, of course, is that opportunists would take advantage of the emergency to raise their prices of essential goods to unconscionable levels. This is the scenario that moved the District of Columbia Council and many State legislatures to enact price gouging laws that apply to emergencies.

The District's price gouging law, however, is quite different from the laws of other jurisdictions. Virtually all of the States enacted laws aimed at curbing increasing prices during an emergency by prohibiting "unconscionable" or "excessive" prices, or by restricting prices that exceed those that were in effect immediately before the emergency. They were not intended to affect prices that are actually lower than those that preceded the emergency. The District's law is the only price gouging law that limits margins (or "markups") as opposed to prices. See, Attachment "B" hereto, which summarizes the price gouging laws of other jurisdictions.

Unlike the process of limiting prices, the limitation of profit margins, especially on a percentage basis, has the unintended effect of making it difficult and (and in some cases) impossible to do business when the wholesale prices of essential goods are falling. Falling prices during an emergency were not considered by the Council when it enacted the price gouging law, and they were certainly not the evil the D.C. law was designed to prevent. But falling wholesale prices are possible, and even probable, in many cases when the emergency creates conditions that dampen demand for certain merchandise. As shown below, the District's price gouging law would have a crushing effect on merchants when wholesale prices fall.

Under the law of the District, margins are limited to the same **percentage** that was in effect during the 90 day period immediately preceding the emergency. When wholesale buying prices fall, the percentage markup (in real dollars and cents terms) gets smaller and smaller to the point where margins are insufficient to cover the cost of doing business. The following example should illustrate the point.

If the wholesale price of goods in the Washington Metropolitan Area (the "WMA") before the emergency averaged two dollars per unit and the average markup over wholesale cost was 50 cents per unit, the average markup is 25 percent. Assume that the 50-cent markup was enough for the merchants to pay all their overhead expenses and earn a reasonable profit. Under DC law, however, merchants were required to limit their markups to the same 25 percent after the declaration of emergency, even if the wholesale price of the merchandise fell. If wholesale prices fell to 60 cents per unit, the same 25 percent markup is now 15 cents. Merchants could not operate on a 15-cent markup and pay their overhead expenses, without losing money. This anomalous result can occur because the drafters of the District's price gouging law were not focused on the possibility that wholesale prices would fall during an emergency. The fear was that scarcity of essential products would drive prices higher.

This hypothetical became a reality for our members who sold gasoline in the District of Columbia during the pandemic. Because the federal and D.C. governments were locked down, and all but essential businesses were closed, the roads were virtually empty of motorists and the demand for gasoline plummeted. This was the case throughout the country. The drastically lower demand for gasoline nationwide caused crude oil and wholesale gasoline prices to crater. During the COVID-19 emergency, retailers were selling anywhere between one-third and one-

half of the gasoline they sold before the pandemic. They needed higher profit margins to offset the steep decline in the number of gallons they sold. Yet, under the District's law, they were allowed significantly **smaller** markups on these drastically reduced gallons. As wholesale prices decreased, the **percentage markups** on lower wholesale buying prices shrunk in real terms. A 25 percent margin on 2 dollar gasoline is 50 cents, but it is only 15 cents when the wholesale price of gasoline hit 60 cents per gallon.

Thus, gasoline retailers lowered their retail prices to consumers significantly but not by as much as their wholesale buying prices declined. D.C. consumers enjoyed the lowest gasoline prices in decades during the pandemic, with prices going as low as \$1.89 per gallon for regular unleaded gasoline. But the retailers' margins in many cases exceeded those allowed (in percentage terms) by D.C.'s price gouging law. Had they passed through to the consumer the entire decrease in their wholesale costs, they could not have met their overhead expenses, thus ensuring the counterproductive result discussed above and the closure of gas stations city-wide.

Under the proposed legislation, retailers would face mandatory civil penalties in the amount of \$10,000 per violation. **In just one day**, the penalties could easily reach 2 million dollars. (Two hundred customers at \$10,000 per sale). The penalties would put every violator out of business, and no one would risk incurring these penalties as a cost of doing business in the District.

Accordingly, MAPDA and WMDA respectfully request that the proposed legislation be amended to allow the court discretion to assess penalties based on the gravity of the offense, and to preclude, or severely limit, orders requiring penalties or restitution where (i) the price of merchandise sold did not exceed the prices charged immediately before the emergency; or (ii) the imposition of penalties or restitution would work an undue hardship on the retailer. Under this formulation, the price gouging law would continue as a deterrent to increased prices during an emergency, holding out the possibility of steep penalties for violations and orders requiring restitution of the ill-gotten gains. It would do so, however, without the anomalous effect of destroying merchants' businesses and making it impossible to do business in the District of Columbia when wholesale prices are falling. It would also not affect the Superior Court's ability to issue injunctions against any type of violation.

Finally, the emergency declared by the Mayor will be two years old in a few short months. We urge the Council, therefore, to adopt our proposed amendment and apply it immediately to any penalty or other monetary award assessed after the effective date of the amendment. While the best solution to the problems addressed above may be to amend the District's price gouging law in its entirety, an immediate change to the penalty provision would be the best way to avoid serious injustices while a new price gouging law is being considered.

Summary of State "Price Gouging" Statutes and Regulations*

State	Authority	Prohibited Acts	Penalties	Enforced by
AL	Ala. Code §§ 8-31-1 thru 8-31-6	Prohibits "unconscionable prices" for sale or rental of any commodities or rental facilities during a declared state of emergency. A price is prima facie "unconscionable" if it exceeds 25% of the average price during the last 30 days immediately prior to the declared emergency and that increase is not attributable to reasonable costs.	\$1,000 per violation, not to exceed \$25,000 per 24 hour period	State Attorney General or District Attorney
AR	A.C.A. § 4-88-301 - 4-88-305	Prohibits "excessive and unjustified" increases in prices of essential consumer goods and services (including gasoline) during a federal, state, or local declared emergency or "red condition" declared by the federal or state Departments of Homeland Security. An "excessive and unjustified" price is identified as a price of more than 10% above the price charged immediately prior to the declared emergency (unless increase was directly attributable to costs charged by a supplier and/or incurred in procuring the goods).	Per se violation of Arkansas consumer protection statute. Criminal penalties available.	State Attorney General; Private Plaintiff
CA	Cal. Pen. Code § 396	Prohibits sales or offers to sell consumer goods and services (including fuel) at a price of more than 10% above the price charged for those goods and services immediately prior to a federal, state, or local declared emergency. A violation does not occur if the price increase is directly attributable to increased costs from a supplier or costs incurred in providing the service during the emergency, provided that the additional costs represents no more than 10% above the cost to the seller plus a customary markup.	\$2500 per violation plus injunction and/or restitution. Criminal penalties available.	State Attorney General, District Attorney, City Attorney, or City Prosecutors. Private Plaintiff (only injunctive relief and/or restitution)
CN	Conn. Gen. Stat. § 42-230	Prohibits price increases for any item during a federal or state declared disaster.	\$5,000 per violation. Violation of statute is a violation of Connecticut general consumer protection statute.	State Attorney General
D.C.	D.C. Code § 28-4101 thru 28-4102	Prohibits charging "more than the normal average price" for any merchandise or service during a natural disaster or declared state of emergency. Normal average price for services is defined as "not more than 10%" above the price existing in the 90-days preceding the disaster or declared emergency. Normal average price for goods is defined as "the price equal to the wholesale cost plus a retail markup that is the same percentage over wholesale cost as the retail markup" for the same product in the 90 days immediately preceding the disaster or declared emergency.	\$1000 maximum fine plus revocation of license and/or permit.	D.C. Attorney General
FL	Fla. Stat. Ann. § 501.160	Prohibits "unconscionable" prices for any essential commodity during a state declared emergency. An unconscionable price is defined as an amount that represents a "gross disparity" between the price of the commodity charged and the average price of the same item during the 30 days immediately prior to the declared emergency, providing that the increased price is not directly attributable to additional costs.	\$1,000 per violation and up to \$25,000 for multiple violations within 24 hour period.	State Attorney General and/or Florida Dept. Agriculture and Consumer Services.

GA	Ga. Code Ann. § 10-1-393.4	Prohibits prices that are higher than the price at which any necessary goods or services were sold or offered for sale immediately prior to a state declared emergency. Prices may be increased in an amount that "accurately reflects" an increase in cost or increase in transporting the goods or services to the area	\$5000 per violation. Increased fines of \$15,000 where violation involves goods and/or services related to repairs of structures damaged by the disaster.	Georgia Governor's Office of Consumer Affairs
HI	Haw. Rev. Stat. § 209-9	Prohibits any increase in the selling price of any commodity (at retail or wholesale) during a state declared emergency or severe weather warning.	Violation is a violation of Hawaii consumer protection statutes.	Hawaii Office of Consumer Protection
ID	Idaho Code § 48-603	Prohibits "excessive or exorbitant" prices for consumer fuel, food, pharmaceuticals, or water during a state declared emergency. Court may consider additional costs incurred because of the disaster or emergency in determining whether a price was excessive or exorbitant.	\$5000 per violation plus restitution and injunctive relief.	State Attorney General
IL	Ill. Admin. Code tit. 14, §§ 465.10 thru 465.30	Declares the sale or offer for sale of petroleum products during any "market emergency" at an unconscionably high price. A price is unconscionably high if (1) the amount charged is a gross disparity between the price of the petroleum product and (i) the price at which the same product was sold or offered for sale in the usual course of business immediately prior to the onset of the market emergency; or (ii) the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area, and (2) disparity is not substantially attributable to increased prices charged by suppliers or increased costs due to an "abnormal market disruption."	Violation is a violation of Illinois general consumer protection act.	State Attorney General
IN	Ind. Code §§ 4-6-9.1-1 thru 4-6-9.1-7	Grants investigatory and enforcement authority to the State Attorney General regarding alleged instances of "price gouging" with respect to fuel prices. Price gouging occurs if (1) an amount charged grossly exceeds the average price at which fuel was readily available during the seven (7) days immediately prior to a declared emergency; and (2) the increase is not attributable to costs incurred by the seller.	\$1000 per violation plus restitution and injunctive relief.	State Attorney General
IA	61 IAC 31.1(714)	Prohibits "excessive prices" for "merchandise needed by victims of disasters" during a declared emergency and any subsequent recovery period. An "excessive price" is a price that is not justified by seller's actual cost plus a reasonable profit. A presumption of excessive price exists from a "substantial increase" in price over the price that existed immediately prior to the onset of the emergency.	\$40,000 per violation. Increased by \$5000 if committed against elderly.	State Attorney General
KS	K.S.A. § 50-6,106	Prohibits "unjustifiably" increasing prices for any necessary property or service during a time of disaster. A price is prima facie "unjustified" if it grossly exceeds the price charged by the supplier on the business day before the disaster (increase of more than 25% equals "gross excess"). Court may consider whether the increase was attributable to additional costs incurred by the seller.	\$10,000 per violation. Increased by \$5000 if committed against elderly or disabled.	State Attorney General, District Attorney, County Attorney
KY	Ky. Rev. Stat. Ann. § 367.374	Prohibits prices for enumerated products and services (including fuel) that are "grossly in excess" of prices that existed prior to a state declared emergency or condition red declared by the U.S. or Kentucky departments of Homeland Security, and which increase is unrelated to any increased cost to the seller.	\$5000 for initial offense, \$10,000 for additional offenses. Violation is violation of Kentucky consumer protection statutes.	State Attorney General

LA	LA R.S. 29:732	Prohibits receipt of value for goods and services that exceeds the prices ordinarily charged for comparable goods and services in a market area under a state or local emergency and/or during a named tropical storm or hurricane in or threatening the Gulf of Mexico. Value received may include reasonable expense and costs necessarily incurred in procuring the goods and services during the emergency.	Violation is violation of Louisiana consumer protection laws. Civil penalties include restitution and/or injunctive relief. Substantial criminal penalties (including fines and and imprisonment) if violation resulted in serious bodily injury and/or death.	Attorney General, District Attorney, or Parish Attorney
ME	Me. Rev. Stat. Ann. § 1105	Prohibits "profiteering in necessities." Prohibits willful destruction or permitting preventable waste in the production, manufacture, storage or distribution of necessities with the intent to enhance the price or restrict the supply of necessities. Also prohibits any "unjust or unreasonable profit" in the sale or exchange of necessities, including any contract, combination, conspiracy, or aiding and/or abetting the same.	Civil penalties of \$10,000. Criminal penalties available	State Attorney General; Private Plaintiff
MA	Md. Reg. Code tit. 940, § 3.18	Prohibits the sale or offer to sale of any petroleum product by any petroleum-related business at "unconscionably high" prices during any market emergency. An unconscionably high price exists if there is a gross disparity between the price charged and (i) price at which similar products were sold immediately before the emergency or (2) price at which the same or similar products are readily obtainable in the same trade area; and (3) the disparity is not due to increased costs caused by the abnormal market disruption.	\$5,000 per violation	State Attorney General, Private Plaintiff
MI	Mich. Stat. Ann. § 445.903(z)	Prohibits prices that are "grossly in excess" of price at which similar property and/or services are sold. No requirement of emergency.	Up to \$25,000	State Attorney General
MS	Miss. Code Ann. § 75-24-25	Prohibits receipt of value for all goods and services in excess of prices ordinarily charged for comparable goods and services during a declared state of emergency. Value received may include expenses and costs incurred as a result of obtaining and/or providing the goods and/or services during the emergency.	\$10,000 per violation. Criminal penalties available (violation can be either misdemeanor or felony)	State Attorney General
MO	15 CSR § 60-8.030	Prohibits charging an "excessive price" for any necessity within a "disaster area" or charging an "excessive price" for any necessity the seller has reason to know will be provided to consumers in a disaster area. Also prohibits taking advantage or a person's physical or mental impairment and/or hardship to charge a price substantially above the previous market price.	\$1000 per violation plus restitution and injunctive relief. Felony if committed knowingly.	State Attorney General, District Attorney, Private Plaintiff
NJ	N.J.S.A. §§ 56:8-107 to 8:109	Prohibits "excessive" price increases for necessities during a declared state of emergency. A price is excessive if it is more than 10% above the price at which the good or service was offered immediately prior to the state of emergency and such increase was not attributable to additional costs due to the state of emergency.	\$10,000 for initial violation, \$20,000 for additional violations	State Attorney General, Private Plaintiff

NY	NY Gen Bus §396-r	Prohibits "unconscionably excessive" prices charged by any party within the chain of distribution for necessary consumer goods and services during a declared state of emergency. Prima facie proof of "unconscionably excessive" includes evidence that (i) of a gross disparity between the amount charged and price for the same goods immediately prior to the abnormal disruption; or (ii) the amount charged grossly exceeds price at which same or similar products were readily obtainable in the same area. Defendant may rebut with evidence that price was result of additional costs outside of his/her control.	\$10,000 and restitution	State Attorney General
NC	N.C. Gen. Stat. § 75-38	Prohibits "unreasonably excessive" prices during a declared state of disaster. Court will consider (i) whether the price charged is attributable to additional costs imposed or incurred during the state of disaster; and (ii) whether the seller offered to sell or rent the merchandise at a price that was below the seller's average price during the 60 days before the state of disaster.	\$5,000 per violation	State Attorney General; Private Plaintiff
OK	15 OK St. §§ 777.1 thru 777.5	Prohibits prices at more than 10% above the price for goods, services, dwelling units, or storage space charged immediately prior to a declared state of emergency unless the increase is attributable only to factors "unrelated" to the emergency and does not include any increase in profit.	Up to \$10,000 per violation plus costs. Criminal penalties available (violation can be misdemeanor or felony).	Attorney General, District Attorney
SC	S.C. Code Ann. § 39-5-145	Prohibits "unconscionable prices" on the sale of commodities or dwelling units during a declared state of emergency. An "unconscionable price" is a price that (i) represents a gross disparity between the price charged and the price of the same or similar goods during the 30 days prior to the declared emergency; or (ii) grossly exceeds the average price at which the same or similar commodity was readily obtainable in the same area during the 30 days prior to the declared emergency unless the increase is attributable to additional costs.	Violation of South Carolina unfair practices act and subject to \$5000 per violation. Increase to \$15,000 if violation of imposed injunction.	State Attorney General; District Attorney
TN	Tenn. Code Ann. §§ 47-18-5101 thru 47-18-5104	Prohibits "excessive and unjustified" increases in price for necessary consumer goods and services during a declared state of emergency. An "excessive and unjustified" increase in price is a increase that grossly exceeds the price generally charged for the same product immediately prior to the emergency and the increase is not directly attributable to additional costs.	\$1000 per violation	State Attorney General
TX	Tex. Bus & Com. Code §17.46(b)(27)	Prohibits "exorbitant or excessive" prices in connection with sale or lease of necessities during a declared disaster.	Up to \$20,000 per violation.	State Attorney General, District Attorney, or County Attorney
VA	Va. Code §§ 59.1-525 et seq	Prohibits "unconscionable" prices for necessities during a declared state of emergency. Courts will consider whether price charged grossly exceeded the price charged for the same or similar products in the 10 days prior to the emergency. Consideration is also given to whether an increase in price was attributable "solely to additional costs incurred" by the seller.	\$25,000 per willful violation	State Attorney General, Commonwealth Attorneys, City, Town, and County Attorneys
WV	W.V. Code § 46A-6J-1	Prohibits prices at more than 10% above the price for necessary goods and services during the 10 days before a declared emergency unless the increase is attributable to increased costs associated with providing the good and/or service during the emergency.	Violation is violation of West Virginia consumer protection laws. Civil and criminal penalties available	State Attorney General

*Adapted and revised by Rebecca H. Benavides, an associate in the Houston office of Fulbright & Jaworski L.L.P., from the National Conference of State Legislatures, Energy and Electric Utilities, State Laws and Regulations: Price Gouging (10/8/2004), available online at <http://www.ncsl.org/programs/energy/lawsgouging.htm> (visited 3/22/2006). Ms. Benavides practice area includes Antitrust, Marketing and Trade Regulation and Energy Litigation.


Government of the District of Columbia
Office of the Chief Financial Officer



Fitzroy Lee
Acting Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Fitzroy Lee
Acting Chief Financial Officer 

DATE: February 14, 2022

SUBJECT: Fiscal Impact Statement – Seasonal Pricing and Price Gouging
Amendment Act of 2022

REFERENCE: Bill 24-126, Committee Print as provided to the Office of Revenue
Analysis on February 11, 2022

Conclusion

Funds are sufficient in the fiscal year 2022 through fiscal year 2025 budget and financial plan to implement the bill.

Background

The bill makes permanent changes and clarifications to price gouging and stockpiling laws, some of which have been temporarily in effect during the public health emergency.¹

The bill clarifies that price gouging prohibitions apply during a declared public health emergency. Currently, permanent law only prohibits price gouging during a natural disaster. The bill also clarifies the level of price change that constitutes price gouging for vehicle rentals and hotel rooms. The bill prohibits stockpiling of goods that have been declared by the Mayor or the federal government as necessary for first responders, maintenance of supply chains, or government ordered rationing.

Additionally, the bill sets penalties for stockpiling or price gouging at a minimum of \$1,000 per violation and no more than \$10,000 per violation, depending on severity of the violation. It also requires courts to apply the maximum penalty per violation, but only if the violation involves goods that have been declared by the Mayor or the federal government as necessary for first responders,

¹ See, e.g. Coronavirus Support Emergency Act of 2020, enacted May 27, 2020 (A23-326; 67 DCR 7045) and subsequent emergency and temporary bills and amendments.

The Honorable Phil Mendelson

FIS: Bill 24-126, "Seasonal Pricing and Price Gouging Amendment Act of 2022," Draft Committee Print as provided to the Office of Revenue Analysis on February 11, 2022

maintenance of supply chains, or government ordered rationing. Current temporary law requires the maximum penalty for any type of good.

Lastly, the bill clarifies that it is not considered a violation if the wholesale price of merchandise decreases while the retail price stays the same, or if the price is not decreased proportionally with wholesale price.

Financial Plan Impact

Funds are sufficient in the fiscal year 2022 through fiscal year 2025 budget and financial plan to implement the bill. The Office of the Attorney General and the District Department of Consumer and Regulatory Affairs have been responsible for enforcing price gouging laws during the current public health emergency. The bill is not expected to significantly increase the number of cases currently managed by the agencies, so the agencies can implement the changes within current resources.

COMMITTEE OF THE WHOLE
DRAFT COMPARATIVE PRINT
BILL 24-126

D.C. OFFICIAL CODE § 28-4101. DEFINITIONS.

For the purposes of this chapter, the term:

(1) “Natural disaster” means the actual or imminent consequence of any disaster, catastrophe, or emergency, including fire, other than a fire caused by human error or arson, flood, earthquake, storm, or other serious act of nature, which threatens the health, safety, or welfare of persons or causes damage to property in the District of Columbia.

(2) “Normal average retail price” means:

(A) In the case of services, not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area during the 90-day period that preceded an emergency that resulted from a ~~natural disaster, if an emergency is declared pursuant to § 28-4102(b)~~ natural disaster, if an emergency is declared pursuant to § 28-4102(b), or the circumstances giving rise to a public health emergency, if an emergency is declared pursuant to § 7-2304.01; or

(B) In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period that immediately preceded an emergency that resulted from a natural disaster, ~~if an emergency has been declared pursuant to § 28-4102(b)~~ natural disaster, if an emergency is declared pursuant to § 28-4102(b), or the circumstances giving rise to a public health emergency, if an emergency is declared pursuant to § 7-2304.01.

(C) Notwithstanding subparagraphs (A) and (B) of this paragraph, for calendar year 2022 and thereafter, “normal average retail price” means for a rental vehicle as defined in § 50-1505.01(8), not more than 10% more than the price at which a rental vehicle was leased during the same week of the same month of the prior year in the Washington Metropolitan Area.

(D) Notwithstanding subparagraphs (A) and (B) of this paragraph, for calendar year 2022 and thereafter, “normal average retail price” means, for a hotel room in a hotel that is at least 95% occupied, not more than 10% more than the price at which a room was booked or advertised to be booked during the same week of the same month of the most recent year for which there was an average hotel room occupancy of 95% in the Washington

Metropolitan Area. For purposes of this subparagraph, the term “hotel room” means any room or suite of rooms at a facility affording sleeping accommodations to transient guests.

(3) “Person” means a corporation, firm, agency, company, association, organization, partnership, society, joint stock company, or an individual.

(4) “Washington Metropolitan Area” means the Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Statistical Area as defined by the United States Office of Management and Budget.

* * *

D.C. OFFICIAL CODE § 28-4102. OVERCHARGING.

(a) It shall be unlawful for any person to charge more than the normal average retail price for any merchandise or service sold during **a public health emergency declared pursuant to § 7-2304.01, or during** an emergency that resulted from a natural disaster, ~~if an emergency has been~~ declared pursuant to subsection (b) of this section.

(b)(1) Within 48 hours of a natural disaster, the Mayor may declare, for not more than 30 calendar days, a state of emergency for the purposes of this act. The Mayor shall prepare an emergency declaration that shall include a description of the existence, nature, extent, and duration of the emergency.

(2) Upon the issuance of a declaration of an emergency or as soon as practicable given the nature of the emergency, the Mayor shall publish a copy of the emergency declaration in the District of Columbia Register and in 2 daily newspapers of general circulation.

(c) It shall not be considered a violation of subsection (a) of this section when the wholesale price for merchandise decreases during an emergency or public health emergency and a retailer maintains the same or lower retail price for said merchandise that was charged prior to an emergency or public health emergency. This subsection shall apply to violations occurring on or after February 15, 2022.

* * *

D.C. OFFICIAL CODE § 28-4102.01. STOCKPILING.

It shall be unlawful for any person to purchase goods in quantities greater than those specified by the Mayor or the federal government during a public health emergency declared pursuant to § 7-2304.01, or during an emergency resulting from a natural disaster declared pursuant to § 28-4102(b), if the Mayor or the federal government have declared said goods to be:

(1) Necessary for first responders or others during a natural disaster or public health emergency;

(2) Necessary to maintain supply chains of commerce during a natural disaster or a public health emergency; or

(3) Subject to government-ordered rationing.

* * *

D.C. OFFICIAL CODE § 28-4103. PENALTIES.

(a)(1) A ~~person who violates § 28-4102(a)~~ violation of § 28-4102(a) or § 28-4102.01 shall be a civil infraction for purposes of Chapter 18 of Title 2 subject to a fine of not more than \$1,000.

(2) ~~The Mayor may revoke, suspend, or limit the license, permit, or certificate of occupancy of a person who violates § 28-4102(a).~~ For each such violation § 28-4102(a) or § 28-4102.01, civil fines, penalties, and fees in an amount not more than \$1,000 may be imposed by the Mayor, pursuant to Chapter 18 of Title 2.

(3) Adjudication of any infraction under this subsection shall be pursuant to Chapter 18 of Title 2.

(b) ~~A violation of § 28-4102(a) shall be a civil infraction for the purposes of Chapter 18 of Title 2. Civil fines, penalties, and fees may be imposed as sanctions for any infraction, pursuant to Chapter 18 of Title 2. Adjudication of any infraction shall be pursuant to Chapter 18 of Title 2. In addition to any monetary penalty imposed under this section, the Mayor may revoke, suspend or limit the license, permit, or certificate of occupancy of a person who violates § 28-4102(a) or § 28-4102.01.~~

(c) In addition to any monetary penalty imposed under subsection (a) of this section, the Office of the Attorney General may bring a civil action against any person for a violation of § 28-4102(a) or § 28-4102.01. If the court finds that the defendant has violated either of these sections, it shall assess a penalty of not less than \$1,000 and not more than \$10,000 per violation; provided that the court shall assess the maximum penalty if the violation otherwise involves merchandise or services that the Mayor or the federal government has declared to be:

(1) Necessary for first responders or other people following a natural disaster or public health emergency;

(2) Necessary to maintain supply chains of commerce during a natural disaster or public health emergency; or

(3) Subject to government-ordered rationing.

(d) Subsection (c) of this section shall apply as of February 15, 2022.

9 A BILL

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12 24-126
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15 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
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20 To amend Title 28 of the District of Columbia Official Code to allow for alternative calculation
21 of normal average retail prices for rental vehicles and hotel rooms based on a seasonal
22 pricing model, to prohibit stockpiling of certain goods following a natural disaster or
23 declaration of a public health emergency, to make the declaration of a public health
24 emergency a triggering event for the prohibition against price gouging; and to provide for
25 penalties if the court finds a person has engaged in prohibited price gouging or
26 stockpiling in a civil action brought by the Office of Attorney General.
27

28 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
29 act may be cited as the “Seasonal Pricing and Price Gouging Amendment Act of 2022”.

30 Sec. 2. Title 28 of the District of Columbia Official Code is amended as follows:

31 (a) The table of contents is amended by adding a new section designation to read as
32 follows:

33 “28-4102.01. Stockpiling.”.

34 (b) Section 28-4101 is amended as follows:

35 (1) Paragraph (2) is amended as follows:

36 (A) Subparagraph (A) is amended by striking the phrase “natural disaster,
37 if an emergency is declared pursuant to § 28-4102(b)” and inserting the phrase “natural disaster,

38 if an emergency is declared pursuant to § 28-4102(b), or the circumstances giving rise to a public
39 health emergency, if a public health emergency is declared pursuant to § 7-2304.01” in its place.

40 (B) Subparagraph (B) is amended by striking the phrase “natural disaster,
41 if an emergency is declared pursuant to § 28-4102(b)” and inserting the phrase “natural disaster,
42 if an emergency is declared pursuant to § 28-4102(b), or the circumstances giving rise to a public
43 health emergency, if a public health emergency is declared pursuant to § 7-2304.01.”

44 (C) New subparagraphs (C) and (D) are added to read as follows:

45 “(C) Notwithstanding subparagraphs (A) and (B) of this paragraph, for
46 calendar year 2022 and thereafter, “normal average retail price” means for a rental vehicle as
47 defined in § 50-1505.01(8), not more than 10% more than the price at which a rental vehicle was
48 leased during the same week of the same month of the prior year in the Washington Metropolitan
49 Area.

50 “(D) Notwithstanding subparagraphs (A) and (B) of this paragraph, for
51 calendar year 2022 and thereafter, “normal average retail price” means, for a hotel room in a
52 hotel that is at least 95% occupied, not more than 10% more than the price at which a room was
53 booked or advertised to be booked during the same week of the same month of the most recent
54 year for which there was an average hotel room occupancy of 95% in the Washington
55 Metropolitan Area. For purposes of this subparagraph, the term “hotel room” means any room or
56 suite of rooms at a facility affording sleeping accommodations to transient guests.”.

57 (2) A new paragraph (4) is added to read as follows:

58 “(4) “Washington Metropolitan Area” means the Washington-Arlington-
59 Alexandria, DC-VA-MD-WV Metropolitan Statistical Area as defined by the United States
60 Office of Management and Budget.”.

61 (c) Section 28-4102 is amended as follows:

62 (1) Subsection (a) is amended to read as follows:

63 “(a) It shall be unlawful for any person to charge more than the normal average retail
64 price for any merchandise or service sold during a public health emergency declared pursuant to
65 § 7-2304.01, or during an emergency resulting from a natural disaster declared pursuant to
66 subsection (b) of this section.”.

67 (2) A new subsection (c) is added to read as follows:

68 “(c) It shall not be considered a violation of subsection (a) of this section when wholesale
69 price for merchandise decreases during an emergency or public health emergency and a retailer
70 maintains the same or lower retail price for said merchandise that was charged prior to an
71 emergency or public health emergency.”.

72 (d) A new section 28-4102.01 is added to read as follows:

73 “§ 28-4102.01. Stockpiling.

74 “It shall be unlawful for any person to purchase goods in quantities greater than those
75 specified by the Mayor or the federal government during a public health emergency declared
76 pursuant to § 7-2304.01, or during an emergency resulting from a natural disaster declared
77 pursuant to § 28-4102(b), if the Mayor or the federal government have declared said goods to be:

78 “(1) Necessary for first responders or others during a natural disaster or public
79 health emergency;

80 “(2) Necessary to maintain supply chains of commerce during a natural disaster or
81 a public health emergency; or

82 “(3) Subject to government-ordered rationing.”.

83 (e) Section 28-4103 is amended to read as follows:

84 “§ 28-4103. Penalties.

85 “(a)(1) A violation of § 28-4102(a) or § 28-4102.01 shall be a civil infraction for
86 purposes of Chapter 18 of Title 2.

87 “(2) For each such violation § 28-4102(a) or § 28-4102.01, civil fines, penalties,
88 and fees in an amount not more than \$1,000 may be imposed by the Mayor, pursuant to Chapter
89 18 of Title 2.

90 “(3) Adjudication of any infraction under this subsection shall be pursuant to
91 Chapter 18 of Title 2.

92 “(b) In addition to any monetary penalty imposed under this section, the Mayor may
93 revoke, suspend or limit the license, permit, or certificate of occupancy of a person who violates
94 § 28-4102(a) or § 28-4102.01.

95 “(c) In addition to any monetary penalty imposed under subsection (a) of this section, the
96 Office of the Attorney General may bring a civil action against any person for a violation of §
97 28-4102(a) or § 28-4102.01. If the court finds that the defendant has violated either of these
98 sections, it shall assess a penalty of not less than \$1,000 and not more than \$10,000 per violation;
99 provided that the court shall assess the maximum penalty if the violation otherwise involves
100 merchandise or services that the Mayor or the federal government has declared to be:

101 “(1) Necessary for first responders or other people following a natural disaster or
102 public health emergency;

103 “(2) Necessary to maintain supply chains of commerce during a natural disaster or
104 public health emergency; or

105 “(3) Subject to government-ordered rationing.

106 “(d) Subsection (c) of this section shall apply as of February 15, 2022.”.

107 Sec. 3. Fiscal impact statement.

108 The Council adopts the fiscal impact statement in the committee report as the fiscal
109 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
110 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

111 Sec. 4. Effective date.

112 This act shall take effect following approval by the Mayor (or in the event of veto by the
113 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
114 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
115 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(1)), and publication in the District of
116 Columbia Register.