



Comments Received by the Department of
Consumer and Worker Protection on

Proposed Rules related to Small Business Regulation Reform

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Comments on DCWP-NOH Small-Business Regulation Reform

As someone who served as the Legislative Director of a trade association representing stores and NYC, the Metropolitan Retail Merchants Association (Metro) and then served as the Policy Analyst for the Consumer Affairs Committee of the NYC Council, I have a compelling interest in making sure NYC consumers and businesses are all treated fairly. I applaud the direction of the Mayor in Executive Order 2 “Small Business Forward” to reform existing business regulations and ensure local businesses face fewer needless fines and penalties. Having agencies review violations to identify unnecessary or unduly onerous violations/fines that unnecessarily hurt small businesses was a great idea, and I’m glad that Department of Consumer and Worker Protection (DCWP) was included in this effort. While I support the cleaning-up of rules virtually never enforced by eliminating them (TV picture tubes, blood pressure reading signs), and the potential reduction in fines by providing a first offense cure period for many of the signage requirements, I am disappointed in seeing the proposed changes by DCWP, as they will do little to address the most cited or most heavily fined violations.

I would be remiss if I did not comment on the fact that this effort seems somewhat disingenuous in light of the fact that at the beginning of this year (January 2022 - Admin. Code 20-703) DCWP increased fines for most unfair trade practices 7-fold, from a maximum of \$500 per violation to \$3,500. These fines are likely to be astronomical in some cases and cause small businesses to fail, even when negligible harm was done to customers. This is especially the case for minority and immigrant owned businesses as they are less likely to have competent lawyers involved in setting up their businesses.

One example of where fines were already high but will now be astronomical will be where DCWP charges a retailer with multiple counts for an unfair trade practice based on individual items or packages observed, as with the Consumer Protection Law rule for price gouging.

Price gouging is a difficult standard for some retailers to calculate as it involves technically difficult calculations, and the city and state have different standards. For example Seventh Elm Drug Corp (click icon at end of paragraph to see OATH decision) was fined \$350 per KN-95 mask that DCWP alleged was over the gouging price by 30-cents per mask. **The store had 20 of these masks for \$6.29 instead of the price DCWP believed was the cap of \$5.99. They were fined \$7,000 for just these masks; a fine that could be \$70,000 today under the new fine structure.** Even \$7,000 seems onerous for a small neighborhood pharmacy during a period where not only customers were at risk, but also the stores that stayed open and serviced them.



fines by
occurrence.pdf

I suggest the new fine structure be overhauled to account for the value to the retailer of the violation; and also that the calculation based on occurrences be modified to account for the absolute value of the violation to the retailer. I also suggest NYC conform their definition and calculation for gouging to state

law. When I was with Metro I remember that the concern was gouging on generators as a result of the blackout. These big ticket items jumped in price to double, triple or more. It was easy to understand that the retailers were gouging, after all they had these in stock and were just marking them up. The calculations on many of the other types of items is far more nuanced and the rules should not unduly hurt small retailers many of whom are immigrants for whom English is not their first (or maybe even second language) and minorities who may have fewer resources and less experience with the laws and rules.

I reviewed the list of first violations that allow curing, and I was really surprised not to see receipt related violations on the list. I was always under the impression that this was a big problem for immigrant and minority businesses who often buy their registers inexpensively and without service. For these groups it is counter-intuitive that the store name must be the legal entity set up for the business and not the doing business as (DBA) name on their shops. Violations are often issued for this and other receipt problems. I think first violations should be allowed to be cured. Although not strictly the purview of this rule change I also recommend that the rules (and if necessary the law) be changed to allow the use of DBA names on receipts (especially receipts for items that are less than \$100 because they are really unlikely to be used in court proceedings). I would recommend continuing to require legal names on contracts because they are much more likely to result in law suits where they are needed.

Lastly, I believe small businesses can and have received devastating fines for Unlicensed Activity. Around 2015 the rules changed to create a “presumption of continuous unlicensed activity” from the date of the first complaint through the date of the hearing when the business is found guilty. Unlicensed Activity fines are calculated by the day, so if it takes 6 months, or a year, or two (2) years to hear a case, the fine is multiplied by the number of days since the complaint/violation. This can result in what is to my mind unconscionable fines. Below are excerpts from the findings for a case that went to OATH (for full decision click icon below) where the initial hearing officer found that the business did not require a car wash license, but on appeal the OATH hearing officer was overruled the original hearing officer and fined the car wash \$102,600:

The penalty for unlicensed car wash activity is \$100 per day..... it is presumed that such activity occurred every day from the date specified on the summons as the “start date” through the hearing date..... the summons alleged that unlicensed activity began on August 14, 2018..... the Tribunal must impose a penalty reflective of the entire time unlawful activity is presumed. Accordingly, the Tribunal reverses the hearing officer’s decision dismissing a charge of Code § 20-541(a), finds Respondent in violation of that charge, and imposes a penalty of \$102,600 as follows: 1,026 days for the period of August 14, 2020, through the hearing date, June 4, 2021.



I recommend that these fines be capped so that the time between a violation being written or an initial complaint and the time when a final decision is made on the merits, which can be very long, should not make these fines outrageous, especially in cases where there are no allegations of customers being hurt.

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