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INDEPENDENT REGULATORY
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Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency

Office of Attorney General

(2) Agency Number: 59

Identification Number: 10

IRRC Number: 3242

(3) PA Code Cite: new 37 Pa. Code Ch. 311

(4) Short Title: Unfair Market Trade Practices.

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Primary Contact: Tracy W. Wertz, Chief Deputy Attorney General, (717) 787-4530
twertz@attorneygeneral.gov

Secondary Contact: Joseph S. Betsko, Senior Deputy Attorney General, (717) 787-4530,
jbetsko@attorneygeneral.gov

(6) Type of Rulemaking (check applicable box):

Proposed Regulation

Final Regulation

Final Omitted Regulation

Emergency Certification Regulation;

Certification by the Governor

Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The purpose of this rulemaking is to define and clarify certain terms under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) in line with state and federal case law. The proposed regulation defines certain anticompetitive conduct as unfair methods of competition and unfair or deceptive acts or practices. The rulemaking provides for the coordination of releasing claims between the Attorney General and private class litigants. The rulemaking also delegates responsibilities under The Administrative Code of 1929.

(8) State the statutory authority for the regulation. Include specific statutory citation.

Section 3.1 of the UTPCPL, 73 P.S. § 201-3.1.
Section 506 of the Administrative Code of 1929, 71 P.S. § 186.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This proposed rulemaking is necessary to provide clear guidance to market participants and consumers as to what the Supreme Court meant when it agreed with the OAG in Monumental Properties that the scope of the UTPCPL generally covers all unfair and deceptive acts or practices in the conduct of trade or commerce. Com., by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 479 (1974). It also serves to synchronize the UTPCPL with the Federal Trade Commission Act on which it is based. Moreover, the rulemaking is necessary to clarify that the standing provision of the private right of action does not limit the scope of trade and commerce regulated by the Attorney General.

This proposed rulemaking is in the public interest to expressly enumerate additional methods, acts or practices in violation of the UTPCPL which would serve to lower the hurdle for consumers to access justice which would otherwise require proving a violation of the so-called catch-all provision.

Small businesses would also benefit from regulation of unfair market trade practices which would promote free and fair competition across all markets within the Commonwealth.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no provisions in the proposed rulemaking that are more stringent than federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

This proposed regulation is comparable with the overall unfair trade and consumer protection framework of many other states. As such, it is not anticipated to affect Pennsylvania's ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This proposed regulation will not affect any other OAG regulations or those of other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. (“Small business” is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

During and following a public hearing on SB 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the UTPCPL and that the OAG should use the UTPCPL to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments. The proposed rulemaking results from the informed comments of the committee members. The OAG then conducted a public hearing on September 11, 2018, which was noticed in the Pennsylvania Bulletin published on August 11, 2018. The OAG received just one comment.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

This regulation will affect market participants and consumers positively across all markets within the Commonwealth by expressly confirming unfair trade and consumer protections through the enumeration of additional methods, acts or practices in violation of the UTPCPL which are otherwise inferred or implied in the so-called catch-all provision.

Moreover, the UTPCPL is a law of broad application and, as a consequence, it is not feasible to break out the impact between small and large businesses. However, this regulation is not anticipated to adversely affect small businesses, but rather to promote free and fair competition for all businesses and small businesses, which is in the public interest.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

All businesses within the scope of the UTPCPL will be required to comply.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Through this rulemaking, market participants and consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The rulemaking is expected to mitigate economic harm against market participants and consumers. The clear articulation of the proposed unfair market trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

There are no expected costs, so the benefits from improving the overall remedial nature of consumer protection outweigh any costs or adverse effects. A further benefit of the regulation is that it clarifies certain key terms of the UTPCPL for market participants and consumers.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the regulated community associated with this rulemaking since much of the provisions comport with federal standards as set forth in Paragraph 11 above. To the extent the regulated community is in compliance with the federal standards, there is no additional burden.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the local governments associated with this rulemaking.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the state government associated with this rulemaking.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

There will be no additional procedures, forms or reports.

(22a) Are forms required for implementation of the regulation?

No.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

Not applicable.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. **Not applicable.**

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(23a) Provide the past three year expenditure history for programs affected by the regulation. N/A

Program	FY -3	FY -2	FY -1	Current FY

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

As described in Paragraph 15 above, there is no adverse impact expected on small business.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

Not applicable.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The OAG considered the status quo and determined that the clear articulation of the proposed unfair trade practices regulation is the least burdensome acceptable alternative. This proposed rulemaking will provide clarity to the public and facilitate compliance with the regulation.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The OAG considered the impact of this rulemaking on small businesses and determined that no adverse impact to small business is expected because the proposed regulation is designed to promote free and fair competition, which will inure to the benefit of small businesses and which is in the public interest.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable.

(29) Include a schedule for review of the regulation including:

- A. The length of the public comment period:
30 days after publication of the proposed rulemaking in the *Pennsylvania Bulletin*.
- B. The date or dates on which any public meetings or hearings will be held: September 11, 2018
- C. The expected date of delivery of the final-form regulation: Fall 2019
- D. The expected effective date of the final-form regulation: Fall 2019
- E. The expected date by which compliance with the final-form regulation will be required: Fall 2019
- F. The expected date by which required permits, licenses or other approvals must be obtained: Not applicable

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The regulation will be reviewed for its effectiveness annually.

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<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: <u><i>Ang M. Elliott</i></u> (DEPUTY ATTORNEY GENERAL)</p> <p><u>AUG 16 2019</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Office of Attorney General</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>59-10</u></p> <p>DATE OF ADOPTION: <u>8/2/19</u></p> <p>BY: <u><i>M. M. A. G.</i></u></p> <p>TITLE <u>First Deputy Attorney General</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u><i>J. W. King</i></u></p> <p><u>8/16/19</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> (Counsel, Independent Agency) (Strike inapplicable title)</p> <p>Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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PROPOSED RULEMAKING
COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

Unfair Market Trade Practices;
Notice of Proposed Rulemaking

Title 37—Law
Office of Attorney General
37 Pa. Code Ch. 311

PROPOSED RULEMAKING

OFFICE OF ATTORNEY GENERAL

[37 PA. CODE CH. 311]

Unfair Market Trade Practices; Notice of Proposed Rulemaking

[49 Pa.B.]
[Saturday, August 31, 2019]

Title 37—Law Office of Attorney General 37 Pa. Code Ch. 311

The Office of Attorney General (OAG), through its Public Protection Division, proposes to amend 37 Pa. Code by adding a new Chapter 311 (relating to unfair market trade practices) to read as set forth in Annex A.

A. *Effective Date*

This proposed rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information on the proposed rulemaking, the primary contact is Tracy W. Wertz, Chief Deputy Attorney General, Antitrust Section and the secondary contact is Joseph S. Betsko, Senior Deputy Attorney General, Antitrust Section, Pennsylvania Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120, (717) 787-4530. This proposed rulemaking is available on the OAG website at www.attorneygeneral.gov.

C. *Statutory Authority*

This rulemaking is proposed under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG, and section 506 of The Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority.

D. *Purpose and Background*

The proposed rulemaking is designed to improve, enhance and update the OAG's unfair methods of competition and unfair or deceptive acts or practices regulations. The specific purpose of the proposed rulemaking is described in more detail under the summary of proposal.

E. Summary of Proposed Rulemaking

1. Introduction

The OAG enforces and administers the act. The OAG has determined that it is necessary for the enforcement and the administration of the act to add regulations concerning unfair market trade practices.

2. Policy and Determination

The OAG has long taken the policy position that unfair market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act in line with federal jurisprudence interpreting Section 5 of the Federal Trade Commission Act (FTCA) (15 U.S.C.A. § 45). During and following a public hearing on SB 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments.

In *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, 60 (Pa.Cmwlt. 2019), the Commonwealth Court held that “the UTPCPL provides two avenues through which activities can be declared ‘unfair methods of competition’ or ‘unfair or deceptive acts or practices.’ First, the General Assembly may define a given activity as unlawful by statute in Section 2(4) of the Law. Second, the Attorney General, by virtue of Section 3.1 of the Law, may also promulgate definitions of these terms through the administrative rulemaking process. 73 P.S. § 201-3.1.” The Commonwealth Court further held that “the Attorney General has thus far declined to deem [certain anticompetitive conduct] as ‘unfair methods of competition’ or ‘unfair or deceptive acts or practices’ under the UTPCPL through the administrative rulemaking process.” *Id.* at 61.

Through the experience of investigation and litigation, the OAG has identified that Pennsylvanians have been disadvantaged by the lack of a clear articulation of state law that makes it easy to understand that Pennsylvanians can recover regardless of whether they have dealt directly or indirectly with the defendant or defendants for injury resulting from anti-competitive conduct. The OAG has determined that this proposed rulemaking under the act will remedy this unfair vacuum under the state law.

3. Unfair Market Trade Practices

The OAG has determined that the following general provisions in the Proposed Rulemaking clarifies operative terms of the act consistent with the basic policy choice expressed in Section 3 of the act (73 P.S. § 201-3). Section 311.2 (relating to definitions) provides for the definition of “unfair market trade practices,” which, in turn, are defined as “unfair methods of competition and unfair or deceptive acts or practices.” Subclause (i) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies intended to impose resale price maintenance restraints. Subclause (ii) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies between competitors for the purpose of price-fixing. Subclause (iii) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies between competitors to allocate markets, reduce output or allocate customers.

Subclause (iv) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies intended to tie the sale of any article of trade or commerce upon the purchase of another article of trade or commerce. Subclause (v) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies for the purpose of reciprocal dealings.

Subclause (vi) under “unfair market trade practices” prohibits all contracts, combinations and conspiracies to effectuate a group boycott. Subclause (vii) under “unfair market trade practices” prohibits actual monopolization. Subclause (viii) under “unfair market trade practices” prohibits attempted monopolization. Subclause (ix) under “unfair market trade practices” prohibits joint monopolization. Subclause (x) under “unfair market trade practices” prohibits incipient conspiracies to monopolize. For purposes of regulatory intent, an agreement among two or more persons to engage in collective bargaining does not come within the scope of this proposed rulemaking.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.3 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. Pennsylvania courts have held that Section 5 of the FTCA is virtually the same as Section 3 of the act and that Pennsylvania courts may look to decisions under the FTCA for guidance in interpreting the act. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 462, 329 A.2d 812, 818 (1974); *Pirozzi v. Penske Olds-Cadillac-GMC, Inc.*, 605 A.2d 373, 376 (Pa. Super. 1992). Pennsylvania courts have interpreted that a violation of federal or state statutes aligned with the purpose of the FTCA and the act constitutes a violation of the act since the act is “broad enough to encompass all claims of unfair and deceptive acts or practices in the conduct of any trade or commerce.” *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007). Section 5(a)(1) of the FTCA provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” The OAG determines that it logically follows that a violation of Section 5 of the FTCA constitutes a violation of the act because such a conclusion incontrovertibly falls within the scope of the Legislature’s basic policy choice in the act that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . .are hereby declared unlawful.”

In holding that the broad prohibition of section 3 of the act and the catchall is broad and flexible, the Pennsylvania Supreme Court denied the application of the doctrine of *ejusdem generis* on the enumerated definitions of unfair methods, acts or practices to circumscribe the statutory construction of the catchall and Section 3 of the act. The Pennsylvania Supreme Court held “[s]uch a holding would negative the Legislature’s understanding that ‘Fraud is infinite’ and would allow the broad prohibition of section 3 to be ‘eluded by new schemes which the fertility of man’s invention would contrive.’ See note 42 *supra*. This we will not do.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 827 (1974). In Note 42 incorporated by reference in the holding, the Pennsylvania Supreme Court cites with approval a federal case which held “[f]raud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.” *Sec. & Exch. Comm’n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193—94, 84 S.Ct. 275, 284 (1963). This is in accord with the FTC’s standard of unfairness. *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972).

This standard was applied in *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983).

The United States Supreme Court has held that Section 5 of the FTCA protects consumers from unfair competitive practices regardless of the effect on competition unlike the federal antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). Rulings under the FTCA have held antitrust violations to constitute an unfair and deceptive practice. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016 (1986); *FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *FTC v. Cement Inst.*, 333 U.S. 683, 688, 68 S. Ct. 793, 797 (1948); and *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

The Commonwealth Court held that the OAG's UTPCPL-based antitrust claim came "within the ambit" of the catch-all. *Anadarko Petroleum Corp.* at 61. The Commonwealth Court credited the OAG's averments that defendants "deceived and acted unfairly towards private landowners by giving them misleading information, and/or failing to disclose information, regarding the open market's true appetite for subsurface mineral rights leases, as well as whether the terms of the agreed-to leases 'were competitive and fair.'" *Id.* In *Lisa Hunt v. Bayer AG*, Feb. Term 2005, No. 1038 (Phila. Comm. Pl.), the court recognized price-fixing to be a violation of the act. In *re Suboxone*, 64 F.Supp.3d 665 (E.D. Pa. 2014), the court held that anticompetitive schemes are redressable under the act. Through cases such as *Anadarko Petroleum Corp.*, *Lisa Hunt* and *In re Suboxone*, the OAG has identified in section 311.2 of the proposed rulemaking certain "unfair market trade practices" which are deemed to be unfair methods of competition and unfair or deceptive acts or practices under the act which are necessary for the enforcement and administration of the act.

4. Core Definitions of Unfair, Deceptive and Fraudulent Conduct

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify the general prohibition of the act and the catchall. Section 311.2 (relating to definitions) provides for the definition of "unfair methods of competition and unfair or deceptive acts or practices." Subclauses (v) and (w) under "unfair methods of competition and unfair or deceptive acts or practices" respectively defines "unfair conduct" and "deceptive conduct" as "unfair methods of competition and unfair or deceptive acts or practices" and thus codify the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the catchall is to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the general prohibition provision is intended to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the per se violations, however enumerated, do not limit or otherwise circumscribe the basic policy choice set forth in the general prohibition provision.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the definition of "unfair methods of competition and unfair or deceptive acts or practices" under Section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. The proposed rulemaking necessarily defines the following terms: "unfair conduct," "fraudulent conduct" and "deceptive conduct" to clarify the scope of "unfair methods of competition and unfair or deceptive acts or practices" within the operation of Section 3 of the act.

First is “unfair conduct.” In *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983), the court held that “[a]n act or practice need not be deceptive to be declared ‘unfair.’” The court in *Nickel* looked to *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972) for guidance on what constitutes unfairness. The *Nickel* court adopted the unfairness standard: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120-121 (Mercer County C.P. 1983). Likewise in federal court construing the act, “an act or practice need not be proven to be deceptive in order to be declared ‘unfair’-which necessarily involves consideration of a variety of factors including whether the practice causes substantial injury to consumers or others. *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983) (citing *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)).” *Westfield Grp. v. Campisi*, 2006 WL 328415, at *18 (W.D. Pa. Feb. 10, 2006). The proposed definition for “unfair conduct” is in accord with state and federal jurisprudence.

Next is “fraudulent conduct.” There are sound policy reasons for the Supreme Court’s mandate that the UTPCPL is to be construed liberally. By the 1960’s following the 1938 amendment of Section 5 of the FTCA which had made unfair or deceptive acts or practices (“UDAP”) unlawful, it became clear that the FTC needed help from the states to combat UDAP. Compounding the FTC issue, persons with an unequal bargaining position seeking redress for UDAP faced significantly difficult hurdles that limited access to justice under the requirements of proving common law fraud.¹ See 1 Pa. C.S. § 1921 (c)(1), (2) and (5). Ultimately, the mischief to be remedied is unfair and deceptive market practices. See 1 Pa. C.S. § 1921 (c)(3). To take down the hurdle of common law fraud² and to move beyond the era of *caveat emptor*, many states like Pennsylvania enacted UDAP statutes to facilitate access to justice in the 1960s and 70s.

“We cannot presume that the Legislature when attempting to control unfair and deceptive practices in the conduct of trade or commerce intended to be strictly bound by common-law formalisms.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 469–70 (Pa. 1974). The UTPCPL is in a class by itself due its *sui generis* nature.” *Gabriel v. O’Hara*, 368 Pa. Super. 383, 394, 534 A.2d 488, 494 (Pa. Super. Ct. 1987). “Since the Consumer Protection Law was in relevant part designed to thwart fraud in the statutory sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). “The Legislature sought by the

¹ See William A. Lovett, *Louisiana Civil Code of 1808: State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 754 n.86 (1972).

² Original *per se* definition subclauses obviated the need to show materiality, scienter, and intention by the declarant to induce action. *Ihnat v. Pover*, 2003 WL 22319459, at *3 (Pa. Com. Pl. Aug. 4, 2003).

Consumer Protection Law to benefit the public at large by eradicating, among other things, 'unfair or deceptive' business practices." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 457 (Pa. 1974). The Supreme Court then interpreted and defined the catch-all relating to "any other fraudulent conduct" to mean "generally all unfair and deceptive acts or practices in the conduct of trade or commerce." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (Pa. 1974). "Rather than restricting courts and the enforcing authorities solely to narrowly specified types of unfair and deceptive practices, the Legislature wisely declared unlawful 'any other fraudulent conduct.' This is a common and well-accepted legislative response to the mischief caused by unfair and deceptive market practices." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 479 (Pa. 1974).

The Supreme Court in footnote 43 pointed to the breadth of Section 5 of the FTCA as an example of the scope of what would come within the meaning of the catch-all. *Id.* The OAG finds that "fraudulent conduct" is "unfair conduct" or conduct that has a tendency or capacity to defraud. In this context, conduct need not rise to the level of common law fraud or satisfy all common law fraud requirements to constitute "fraudulent conduct." Neither the intention to defraud nor actual fraud must be proved; rather it need only be shown that the acts and practices are capable of harming another person in an immoral, unethical, oppressive, unscrupulous or unconscionable way. The goal of the act is to thwart fraud or, in other words, to prevent fraud in its incipiency.

Next is "deceptive conduct." An act or practice is deceptive if it has a tendency or a capacity to deceive. *Com. ex rel Corbett v. Peoples Benefit Service, Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007). "Neither the intention to deceive nor actual deception must be proved; rather it need only be shown that the acts and practices are capable of being interpreted in a misleading way." *Id.* The proposed definition for "deceptive conduct" is in accord with state jurisprudence.

Thus, the OAG finds it necessary for the administration and enforcement of the act to define "unfair conduct," "fraudulent conduct" and "deceptive conduct," in line with the OAG's original arguments to the Supreme Court that the catchall "was designed to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce" to which the Supreme Court unambiguously stated, "we agree." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478, 329 A.2d 812, 826 (1974). Moreover, the definitions are in line with the original legislative intent from 1968 "that this package gives Pennsylvania the strongest consumer-protection laws in the States," *Legislative Journal: House of Representatives*, 1968 Sess. vol. 1, no. 40, at 1231 (July 8, 1968). The Supreme Court has consistently mandated that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). Because the act is a statute that must be liberally construed to effectuate its objective to prevent unfair or deceptive business practices, the definition of "unfair methods of competition and unfair or deceptive acts or practices" as provided in section 2(4) of the act should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992). In other words, for an act that must be liberally construed, a definition of a term and any enumeration therein should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992).

5. Trade and Commerce

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify “trade and commerce” within the meaning of the act. Section 311.2 (relating to definitions) defines “trade and commerce” and codifies the holding of the Supreme Court in *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. Feb. 21, 2018), that the second definition of “trade and commerce” is “an inclusive and broader view of trade and commerce than expressed by the antecedent language.” The Supreme Court further held that the second definition does not modify or qualify the first definition. *Id.* at 16. As a corollary, the first definition does not circumscribe the second definition. The Commonwealth Court followed the Supreme Court in holding that “this second clause operates as a catch-all of sorts, enabling “trade” and “commerce” to be defined in terms of common usage[.]” *Anadarko Petroleum Corp.* at 57.

The definition of “trade and commerce” under Section 311.2 also codifies the holding in *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004), as amended (Apr. 7, 2004), opinion amended on reconsideration, 851 A.2d 987 (Pa. Commw. Ct. 2004), that a buyer-seller relationship is not relevant in the context of the definition for trade and commerce. Except as provided by the single exclusion clearly expressed in Section 3 of the act, there is no class or classes of transactions within the for-profit or nonprofit business sphere that evades the ambit of “trade and commerce” under the act. Further, there is no textual basis under the act that a person must be a seller to be subject to liability under Section 3 of the act. As the Commonwealth Court recently held, “[t]he key phrase here is ‘in the conduct,’ which, when read in the full context of the language used in Section 3 of the UTPCPL, pertains to *all* ‘[u]nfair methods of competition and unfair or deceptive acts or practices’ connected to UTPCPL-defined “trade” or “commerce”,’ *regardless of who is committing these unlawful acts.*” *Anadarko Petroleum Corp.* at 58 (emphasis added).

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the “trade and commerce” definition under Section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. The Proposed Rulemaking resolves the longstanding tactic of defendants to confuse and conflate the limited standing provision of the private action with the broad standing provision of the OAG. Such dilatory and vexatious strategy only serves to unnecessarily tax the resources of the OAG at the expense of the public. The Supreme Court instructs “[t]here is no indication of an intent to exclude a class or classes of transactions from the ambit of the Consumer Protection Law. When the Legislature deemed it necessary to make an exception from the Law's scope, it did so in clear language.” *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 457 n.5, 329 A.2d 812, 815 n.5 (1974); *Culbreth v. Lawrence J. Miller, Inc.*, 328 Pa. Super. 374, 382, 477 A.2d 491, 496 (1984) (The Legislature expressly excluded certain businesses from regulation under the act).

The phrase, “which are classes of transactions without regard to any further limitation or specification as to a person” appended after the word, “distribution,” in the definition of “trade and commerce” under section 311.2 is designed to be in accord with and based on the definition of trade and commerce under the act and codify the holdings of *Danganan*, *Monumental Properties* and *Culbreth*. In *Percudani*, a defendant argued that the Commonwealth failed to allege a buyer-seller relationship. The Commonwealth Court overruled the preliminary objection by illustrating the distinction between an action brought under section 9.2 of the act (73 P.S. §

201-9.2), which allows for private actions by any person "who purchases or leases goods or services primarily for personal, family or household purposes" and an action pursued by the Commonwealth under section 4 of the act (73 P.S. § 201-4), "which allows it to proceed when it has reason to believe that the Law is being or was violated." *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004).

6. Rebate and Payment of Costs and Restitution

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 4.1 of the act. Based on practical experience, the OAG has observed that the payment of rebates do not negate the harm; and, as such, rebates do not constitute a defense to the award of a permanent injunction, payment of costs and restitution, and a civil penalty. Section 311.4 (relating to restraining prohibited acts) provides that the payment of rebates does not moot the remedial purpose of the act to restrain and prevent unfair trade practices and reflects the economic reality that the payment of rebates does not reduce the amount to be restored to a person in interest under section 4.1 of the act. The OAG also finds it necessary for the administration and enforcement of the act to define "person in interest," "moneys or property, real or personal" as used in section 4.1 of the act (73 P.S. § 201-4.1) and "rebate." The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify "person in interest" within the meaning of the act. The Supreme Court held in *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 16 MAP 2017, 2018 WL 4570102, at *17 (Pa. Sept. 25, 2018) that the term, "person in interest," is broader than the statutorily-defined term, "person," and includes the Commonwealth.

7. Direct or Indirect Recovery

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts and holdings of other jurisdictions construing law that is similar to the act to clarify "trade and commerce" further and monetary recovery under the act. The phrase, "including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure" appended at the end of the definition of "trade and commerce" under section 311.2 is designed to be in accord with and based on the definition of trade and commerce under the act and codify the holding of *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005) and *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators*, 574 A.2d 641, 645 (Pa. Super. Ct. 1990), affirmed, 605 A.2d 798 (Pa. 1992).

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the phrase, "including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure" appended at the end of the definition of "trade and commerce" under section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in sections 3 and 9.2 of the act. In *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005), the court recognized that purchasers may recover monetarily regardless of whether the defendant or defendants were dealt with directly or indirectly. The Massachusetts Supreme Court relied on their statute's similarly worded trade and commerce definition to find that indirect recovery is provided by the language: "directly or indirectly affecting the people of this commonwealth." *Ciardi v. F. Hoffmann-La*

Roche, Ltd., 436 Mass. 53, 58, 762 N.E.2d 303, 308 (2002). New Hampshire and Washington likewise allow for indirect recovery based on the same construction. *LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.H. 88, 96, 931 A.2d 571, 578 (2007); *Blewett v. Abbott Laboratories*, 86 Wash.App. 782, 938 P.2d 842, 846 (1997), rev. denied, 133 Wash.2d 1029, 950 P.2d 475 (1998). Consequently, the Proposed Rulemaking clarifies that indirect recovery is so provided under the act.

8. Civil Penalty

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 8 of the act. Section 311.7 recognizes that a payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by section 3 of this act does not bar an award of a civil penalty. Further, the payment of a rebate does not negate the finding of a willful use of an unlawful method, act or practice.

9. Private Actions

The OAG has adopted the staff recommendation to clarify certain terms in or affecting section 9.2 of the act. Section 311.9 provides for the coordination of claims brought by the OAG which are also brought by a private class action to avoid protracted disputes over representation which would unnecessarily tax limited public resources and frustrate the public interest.

The proposed rulemaking clarifies the meaning of the following terms, “ascertainable loss” and “as a result of,” under section 9.2 of the act to comport with the plain language of the provision, the 1996 amendment and the liberal construction mandate. Regarding “ascertainable loss,” under the similarly worded New Jersey private action provision at N.J. Stat. Ann. § 56:8-19, an “ascertainable loss under the CFA is one that is ‘quantifiable or measurable,’ not ‘hypothetical or illusory.’” *D’Agostino v. Maldonado*, 216 N.J. 168, 185, 78 A.3d 527, 537 (2013). Regarding “as a result of,” there is Supreme Court precedent under *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186 (2007) and *Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 777 A.2d 442 (2001) which construed the term, “as a result of,” to mean or require justifiable reliance. However, these opinions apply to causes of action which accrued prior to the 1996 amendment of the act. See 1996, Dec. 4, P.L. 906 No. 146, § 1, effective in 60 days. The Third Circuit declined to read in the common law fraud reliance requirement in the language, “as a result of” in Section 9.2 of the act. “Although it is clear that the loss must follow the purchase of goods or services, the language does not compel the conclusion that the unfair or deceptive conduct must have induced the consumer to make such a purchase.” *In re Smith*, 866 F.2d 576, 583 (3d Cir. 1989). The OAG agrees with the Third Circuit and recognizes the 1996 amendment. This proposed rulemaking clarifies and recognizes the abrogation of these holdings.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.9 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 9.2 of the act. In ascertaining legislative intent, the “General Assembly intends to favor the public interest as against any private interest.” 1 Pa.C.S. § 1922 (relating to presumptions in ascertaining legislative intent). “It is axiomatic that a statute is never presumed to deprive the state of any prerogative, right or property unless the intention to do so is clearly manifest, either by express terms or necessary implication.” *Hoffman v. City of*

Pittsburgh, 365 Pa. 386, 398, 75 A.2d 649, 654 (1950). The OAG determines that the limited right of private action does not empower persons to act as private attorneys general in any class action which would frustrate or otherwise undermine a *parens patriae* action by the OAG. A federal court has held that "in the situation where a state attorney general and a private class representative seek to represent the same class members, the *parens patriae* action is superior to that of a private class action." *Com. of Pa. v. Budget Fuel Co., Inc.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

10. *Subpoena Power*

The OAG has adopted the staff recommendation to make certain delegations and clarifications. Section 311.11 (relating to administrative) delegates certain powers and duties set forth in The Administrative Code of 1929 as supplemented by section 204(d) of the Commonwealth Attorneys Act (CAA) (71 P.S. § 732—204(d)). The OAG has determined that it is reasonable to make certain clarifications introduced by the enactment of the CAA concerning the permissibility of the direct use of documents obtained by an administrative subpoena in the enforcement of the act. Section 311.10 (relating to subpoena power) implements the inherent investigative function of enforcement to gather Documentary Material, as defined by the act, and made necessary to satisfy the "reason to believe" standing requirement under Section 4 of the act.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.10 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Sections 2 and 3.1 of the act. The OAG takes notice of the 1976 amendments to the act which deleted the very restrictive civil investigative demand authority and retained the definition of documentary material while granting the OAG rulemaking authority. A principle of statutory construction is to ascertain legislative intent and to give effect to all provisions of a statute. 1 Pa.C.S. § 1921 (relating to legislative intent controls); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. at 513; *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 524 (1980).

Sections 918 and 919 of The Administrative Code of 1929, as supplemented by section 204(d) of the CAA, authorize the OAG to issue subpoenas to investigate commercial and trade practices and to require the production of documentary material related to those practices. By reading The Administrative Code of 1929 and the act as one since both relate to protecting consumers from detrimental practices in the conduct of trade and commerce and through the application of the two sources of rulemaking authority invoked in this proposed rulemaking, the proposed rulemaking gives effect to the retained definition which is used nowhere else within the act. 1 Pa.C.S. § 1932 (relating to statutes in *pari materia*); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. 509, 517-20 (1982); *Girard School District v. Pittenger*, 481 Pa. 91, 100 (1978).

11. *Interpretation*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts. Section 311.11 (relating to interpretation) provides that the act is to be liberally construed and that the new definitions of what constitutes unlawful conduct enlarges upon existing definitions. The proposed rulemaking codifies the Supreme Court mandate that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices.

Com., by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 460 (Pa. 1974). Further, the Supreme Court denied the application of the doctrine of *eiusdem generis* on the enumerated definitions of unfair methods, acts or practices to circumscribe the statutory construction of the catchall and Section 3 of the act. The Pennsylvania Supreme Court held "[s]uch a holding would negative the Legislature's understanding that 'Fraud is infinite' and would allow the broad prohibition of section 3 to be 'eluded by new schemes which the fertility of man's invention would contrive.' See note 42 supra. This we will not do." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 827 (1974). Because the intent of the proposed rulemaking is to enlarge the definition of what constitutes a method, act or practice in violation of the act, the proposed rulemaking is not to be interpreted to limit what methods, acts or practices may be considered to violate the act.

12. *Basic Policy Choice*

"The operative provision of the Unfair Trade Practices and Consumer Protection Law provides: 'Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . .are hereby declared unlawful.'" 73 P.S. § 201-3 (emphasis added). *Gabriel v. O'Hara*, 368 Pa. Super. 383, 391, 534 A.2d 488, 492 (1987). The operative provision of the act provides the Legislature's basic policy choice which guides the OAG's proposed rulemaking. The OAG proposes that Chapter 301 be amended and Chapter 311 be added to read as set forth in Annex A.

F. *Paperwork*

Generally, the proposed rulemaking will not increase paperwork and will not create new paperwork requirements. The proposed rulemaking will have a *de minimus* impact on paperwork for class action representatives purporting to settle and release OAG claims under the act.

G. *Benefits, Costs and Compliance*

Through this proposed rulemaking, consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The clear articulation of this unfair trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no new costs on the private sector or the general public.

H. *Sunset Review*

The OAG is not establishing a sunset date for these regulations because they are needed for the OAG to carry out its statutory authority and because the OAG will periodically review these regulations for their effectiveness.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 45.5(a)), on August ____, 2019,

the OAG submitted a copy of this Proposed Rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Judiciary Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the OAG, the General Assembly and the Governor.

J. *Public Comments*

Interested persons are invited to submit written comments, objections or suggestions about this Proposed Rulemaking to the Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120 within 30 days after publication of this Proposed Rulemaking in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted. A public hearing occurred on September 11, 2018 pursuant to Section 3.1 of the act.

Comments also may be submitted by e-mail to antitrust@attorneygeneral.gov. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

JOSH SHAPIRO,

Attorney General

Annex A
TITLE 37. LAW

PART V. [BUREAU OF CONSUMER PROTECTION]UNFAIR TRADE PRACTICES

CHAPTER 311. UNFAIR MARKET TRADE PRACTICES

§ 311.1. Scope.

This chapter establishes what are determined to be unfair methods of competition and unfair or deceptive acts or practices by any person engaged in trade or commerce, but may not be interpreted to limit the power of the Attorney General to determine that another practice is unlawful under the Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1—201-9.3).

§ 311.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

Act—Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1—201-9.3).

Advertising—means any marketing communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.

Article of trade or commerce—any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate.

As a result of—Cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.

Ascertainable loss—Any loss which is quantifiable but not speculative.

Communication—Every manner or means of disclosure, transfer or exchange, and every disclosure, transfer or exchange of ideas or information, whether orally, by document, or electronically, or whether face to face, by telephone, mail, personal delivery, electronic transmission or otherwise.

Deceptive conduct—A method, act or practice which has the capacity or tendency to deceive.

Documentary material—means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

Internet service provider—means a person who furnishes a service that enables users to access content, information, electronic mail or other services offered over the Internet, and access to proprietary content, information and other services as part of a package of services offered to consumers.

Fraudulent conduct—means unfair conduct or any other conduct which has a tendency or capacity to defraud.

Market structure—Of or relating to the interrelationship of sellers and buyers at all levels of distribution of an article of trade or commerce including, but not limited to, manufacturers, suppliers, distributors, wholesalers, retailers and end users.

Marketing communication—Any communication which includes any promoting, selling or distributing of an article of trade or commerce.

Moneys or property, real or personal—means something of value including, but not limited to, restitution, disgorgement, attorneys' fees, expert fees, investigation and litigation costs, and court costs.

Person—means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

Person in interest—means a person, the Commonwealth, a Commonwealth agency, municipal authority or political subdivision whose right, claim, title or legal share in something was affected by conduct enjoined under the act.

Rebate—Partial refund of the cost of an article of trade or commerce to incentivize the sale of that article of trade or commerce.

Representing—means any communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.

Sale—means selling, buying or engaging in any other similar activity involving any article of trade or commerce.

Tangible document or recording—The original or any copy of any designated documents, including, but not limited to, writings, drawings, graphs, charts, photographs, electronically created data and other compilations of data.

Trade and commerce—mean the advertising, offering for sale, sale or distribution, which are classes of transactions without regard to any further limitation or specification as to a person, of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth, including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure.

Transaction—Exchange or transfer of any article of trade or commerce.

Unfair conduct—A method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, the common law, or otherwise within at least the penumbra of any common law, statutory, or other established concept of unfairness; which is unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim.

Unfair market trade practices—means any one or more of the following:

- (i) A contract, combination or conspiracy between two or more persons at different levels of market structure to fix minimum prices for any article of trade or commerce at one or more levels of market structure;
- (ii) A contract, combination or conspiracy between two or more persons at the same level of market structure to fix or otherwise stabilize prices for any article of trade or commerce;
- (iii) A contract, combination or conspiracy between two or more persons at the same level of market structure to allocate marketing territories, to reduce output of any article of trade or commerce or to allocate customers to whom any article of trade or commerce is, has been or will be marketed;
- (iv) A contract, combination or conspiracy between two or more persons to condition or to have the effect of conditioning the sale of one article of trade or commerce upon the purchase of another article of trade or commerce;
- (v) A contract, combination or conspiracy between two or more persons where the sale of an article of trade or commerce is conditioned upon the seller's purchase of any other article of trade or commerce produced or performed by the buyer;
- (vi) A contract, combination or conspiracy between two or more persons at the same or different level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person;
- (vii) Actual monopolization, in which a person acquires or retains actual monopoly power through competitively unreasonable practices;
- (viii) Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved;
- (ix) Joint monopolization, in which two or more persons conspire to jointly retain or acquire monopoly power, where actual monopoly power is achieved through competitively unreasonable practices; and
- (x) Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved.

Unfair methods of competition and unfair or deceptive acts or practices—mean any one or more of the following:

- (a) Passing off goods or services as those of another;
- (b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- (c) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
- (d) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
- (f) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (g) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
- (h) Disparaging the goods, services or business of another by false or misleading representation of fact;
- (i) Advertising goods or services with intent not to sell them as advertised;
- (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (k) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (l) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;
- (m) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or

anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars (\$25) or less;

(n) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(o) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(p) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(q) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:

(A) the identity of the seller;

(B) that the purpose of the call is to sell goods or services;

(C) the nature of the goods or services; and

(D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;

(r) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(s) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(A) within that time clearly and conspicuously stated in any such solicitation; or

(B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time

the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;

(t) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:

(A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;

(B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect on any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(u) Unfair market trade practices

(v) Unfair conduct;

(w) Deceptive conduct; and

(x) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

§ 311.3. Unlawful acts or practices; exclusions.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. The provisions of this chapter shall not apply to any owner, agent or employe of any radio or television station, or to any owner, publisher, printer, agent or employe of an Internet service provider or a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§ 311.4. Restraining prohibited acts.

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by Section 311.3 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The payment of a rebate by any person to a person in interest does

not act as a bar to the imposition of a temporary or permanent injunction or the award of any form of monetary relief under this chapter.

§ 311.5. Payment of costs and restitution.

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in Section 311.4, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§ 311.6. Assurances of voluntary compliance.

In the administration of this act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of this chapter from any person who has engaged or was about to engage in such method, act or practice. Such assurance may include a stipulation for voluntary payment by the alleged violator providing for the restitution by the alleged violator to consumers, of money, property or other things received from them in connection with a violation of this act. Any such assurance shall be in writing and be filed with the court. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest, pursuant to Section 311.4.

§ 311.7. Civil penalties.

(a) Any person who violates the terms of an injunction issued under Section 311.4 or any of the terms of an assurance of voluntary compliance duly filed in court under Section 311.6 shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars (\$5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued; and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under Section 311.4, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by Section 311.3, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars (\$1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under Section 311.4 and 311.5. Where the victim of the wilful use of a method, act or practice declared unlawful by Section 311.3 is sixty years of age or older, the civil penalty shall not exceed three thousand dollars (\$3,000) per violation, which penalty shall be in addition to other relief which may be granted under Sections 311.2 and 311.5. A payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by Section 311.3 does not bar an award of a civil penalty.

§ 311.8. Forfeiture of franchise or right to do business; appointment of receiver.

Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under Section 311.4. In addition, the court may appoint a receiver of the assets of the company.

§ 311.9. Private actions.

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by Section 311.3, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

(b) Any permanent injunction, judgment or order of the court made under Section 311.4 shall be prima facie evidence in an action brought under this Section that the defendant used or employed acts or practices declared unlawful by Section 311.3.

(c) A person may not settle and release any claim under the act as part of a class action in any court of competent jurisdiction without first providing notice to and receiving written consent from the Office of Attorney General.

(d) Except as provided by 71 P.S. § 732-103 (relating to standing to question legal representation), no person has standing to question the authority of the legal representation of the Commonwealth and its citizens where the Office of Attorney General has not granted consent or has transmitted a written revocation of such consent under Section 311.9(c).

§ 311.10. Subpoena power.

(a) The Attorney General shall be authorized to require the attendance and testimony of witnesses and the production of any books, accounts, papers, records, documents, and files relating to any commercial and trade practices to the extent authorized by 71 P.S. § 307-2 (relating to the powers and duties of the Bureau of Consumer Protection) as amended by 71 P.S. § 732-204(d) (relating to the administration of consumer affairs program) under this chapter and conduct private or public hearings; and, for this purpose, the Attorney General or his representative may sign subpoenas, administer oaths or affirmations, examine witnesses and receive evidence during any such investigation or public or private hearing. In case of disobedience of any subpoena or the contumacy of any witness appearing before the Attorney General or his representative, the Attorney General or his representative may invoke the aid of the Commonwealth Court or any court of record of the Commonwealth, and such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents and files relative to the

matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) No documentary material produced pursuant to a demand under this section shall, unless otherwise ordered by a court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to any person other than the authorized employe of the Attorney General without the consent of the person who produced such material: Provided, That under such reasonable terms and conditions as the Attorney General shall prescribe, such documentary material shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person. The Attorney General or any attorney designated by him may use such documentary material or copies thereof as he determines necessary in the enforcement of this act, including presentation before any court: provided, that any such material which contains trade secrets or other highly confidential matter shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material.

§ 311.11. Interpretation.

(a) This chapter shall be liberally construed to effectuate its objective of protecting the public of this Commonwealth from fraud and unfair or deceptive business practices.

(b) The catchall provision contained in Subsection (x) of the definition of “Unfair methods of competition and unfair or deceptive acts or practices” in Section 311.2 shall not be restricted by the subsections enumerated before it. Instead, it shall be construed as designed to generally cover all unfair or deceptive acts or practices in the conduct of trade or commerce.

§ 311.12. Waiver of rights.

A waiver of this chapter by any person prior to or at the time of a commission of a violation of Section 311.3 or any other section of this chapter is contrary to public policy and is void. An attempt by any person to have another waive his rights under this chapter shall be deemed to be a violation of the Act.



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

August 21, 2019

ANTITRUST SECTION
14th Floor, Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-4530
Fax: (717) 787-1190

Mr. David Sumner, Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

RE: Proposed Regulation Package 59-10: Unfair Market Trade Practices

Dear David:

The Office of Attorney General (OAG) is submitting a proposed new chapter 311 to its regulations under 37 Pa. Code. Enclosed please find a copy of the regulatory analysis form, signed CDL-1 face sheet, preamble and Annex A (regulatory text). The OAG approved this proposed rulemaking for form and legality.

This proposed rulemaking is being delivered today to the legislative standing committees and the Legislative Reference Bureau.

If you have any questions or comments about this regulatory submission, please do not hesitate to contact me or Joseph Betsko, Senior Deputy Attorney General, Antitrust Section at (717) 787-4530.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Tracy W. Wertz'.

Tracy W. Wertz
Chief Deputy Attorney General

cc with enclosures:

Honorable Lisa M. Baker, Majority Chair, Senate Judiciary Committee
Honorable Lawrence M. Farnese, Jr., Minority Chair, Senate Judiciary Committee
Honorable Rob M. Kauffman, Majority Chair, House Judiciary Committee
Honorable Tim Briggs, Minority Chair, House Judiciary Committee
Mike Vereb, Director of Government Affairs, Office of Attorney General
Amy Elliott, Chief Deputy Attorney General, Legal Review, Office of Attorney General

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 59-10

SUBJECT: Unfair Market Trade Practices

AGENCY: Office of Attorney General

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - With Revisions Without Revisions

**RECEIVED
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FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<u>HOUSE COMMITTEE - Judiciary</u>
8/21/19	<u><i>Rob M. Kauffman</i></u>	MAJORITY CHAIR <u>Rob M. Kauffman</u>
8/21/19	<u><i>Tim Briggs</i></u>	MINORITY CHAIR <u>Tim Briggs</u>
		<u>SENATE COMMITTEE - Judiciary</u>
8/21/19	<u><i>Lisa Baker</i></u>	MAJORITY CHAIR <u>Lisa Baker</u>
8/21/19	<u><i>Lawrence M. Farnese, Jr.</i></u>	MINORITY CHAIR <u>Lawrence M. Farnese, Jr.</u>
		<u>INDEPENDENT REGULATORY REVIEW COMMISSION</u>
		<u>ATTORNEY GENERAL (for Final Omitted only)</u>
8/21/19	<u><i>Courine Inaut</i></u>	<u>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</u>