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Antitrust Section
Pennsylvania Office of Attorney General
14th Floor, Strawberry Square
Harrisburg, PA 17120

Re: Regulation No. 59-10 (IRRC No. 3242), Proposed New Chapter 311 in 37 Pa. Code, with respect to the Unfair Trade Practice and Consumer Protection Law

Dear Office of the Attorney General:

Anadarko Petroleum Corporation and Anadarko E&P Onshore LLC (collectively "Anadarko") submit these comments in response to the Pennsylvania Office of Attorney General's ("OAG") August 21, 2019 proposed rulemaking, as published on August 31, 2019 in the Pennsylvania Bulletin, 49 Pa.B. 4993, which proposes a new Chapter 311 in 37 Pa. Code that would effectively repeal and replace the Unfair Trade Practices and Consumer Protection Law ("UTPCPL" or the "Act") by administrative rulemaking.

The proposed rulemaking is: an improper executive overreach that exceeds the OAG's administrative rulemaking authority and amounts to legislating new law that the General Assembly has repeatedly declined to enact; an improper and transparent attempt to prejudice Anadarko's pending petition for allowance of appeal from the Commonwealth Court's decision in *Anadarko Petroleum Corporation v. Commonwealth*, 206 A.3d 51 (Pa. Cmwlth. 2019); and an improper effort by the OAG to grant itself broad new veto power over the settlement of private class actions. For these reasons, as detailed below, Anadarko strenuously opposes the proposed rulemaking.

1. The OAG's Proposed Regulations Rewriting and Expanding the UTPCPL

The OAG proposes with the new regulations to rewrite and materially expand the UTPCPL in several substantial ways. Of particular import and reach:

--The OAG proposes to add "unfair market trade practices" as a new category of "unfair methods of competition and unfair or deceptive acts or practices" declared to be unlawful under the Act. This grafts an antitrust law, by administrative fiat, onto a consumer protection law.

--The OAG proposes to expand the definition of "trade and commerce" regulated by the UTPCPL to apply to advertising, offering for sale, sale, or distribution of goods, services, and property "without regard to any further limitation or specification as to a person." Under the new definition, "sale" means buying and selling, and the new

definition would "includ[e] any transaction proposed, initiated or engaged by any person regardless of privity within the market structure." The OAG would further define "transaction" as the "exchange or transfer of any article of trade or commerce," and "article of trade or commerce" as "any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate." This expands the UTPCPL from policing traditional buyer-seller consumer transactions into covering all economic transactions.

--The OAG proposes to add two new "catch-all" provisions for "unfair conduct" and "deceptive conduct," thereby declaring unlawful under the Act "a method, act or practice which has the capacity or tendency to deceive" and "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*" (emphasis added). This expands the Act to proscribe a broad undefined class of "unfair" conduct that need not previously have been considered unlawful and without regard to the actor's intent or fault.

--The OAG proposes to add a new provision that "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." This confers on the OAG a new veto power over the settlement of private class actions involving UTPCPL claims.

2. <u>The Proposed Rulemaking is Premature in Seeking to "Codify" Non-Final Rulings that are Subject to Further Appeal and an Improper Attempt to Circumvent Ongoing Litigation</u>

The OAG prominently bases the proposed rulemaking on *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51 (Pa. Cmwlth. 2019), *petition for allowance of appeal pending.* Indeed, the majority of the proposed rulemaking consists of the OAG's arguments and its (often erroneous) interpretations of the Commonwealth Court's decision in that matter. Among other things, the OAG's proposed new antitrust law, expansion of "trade and commerce" regulated by the Act to encompass virtually every economic transaction, and redefinition of "sale" to mean selling and buying draw directly from the OAG's arguments at issue in the litigation.

That litigation is not final. Anadarko and the other named defendants have sought allowance of appeal to the Pennsylvania Supreme Court, and those allocatur petitions remain pending. Given the lack of finality, it is premature for the OAG to try to "codify" by administrative rulemaking the arguments it advances in an ongoing litigation.

The hurried timing of the OAG's rulemaking, with a final-form regulation and effective and compliance dates of Fall 2019, suggest that the OAG is attempting to circumvent prospective Supreme Court review both in this case and another UPTCPL case pending before the Supreme Court, *Gregg v. Ameriprise*, 195 A.3d 930 (Pa. Super. 2018), *appeal granted,* No. 490 WAL 2018, 2019 WL 2635642 (Pa. June 27, 2019). The OAG of course cannot retroactively "clarify" the interpretation of the UTPCPL through administrative rulemaking. *See, e.g.*, *Commonwealth v. Shaffer*, 734 A.2d 840, 843-44 (Pa. 1999). Nor can there be any dispute that any regulation that might ultimately be promulgated by the OAG would apply retroactively to the

matters at issue in the pending litigation or any pending class action royalty litigation. *See, e.g.*, 1 Pa. C.S.A. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly"); *Kiesh v. Commonwealth, Dep't of Pub. Welfare*, 423 A.2d 1348, 1350 (Pa. Cmwlth. 1980); *Shaffer*, 734 A.2d at 843-44.

3. The Proposed Regulations are Contrary to the Legislative Intent of the UTPCPL

The OAG's proposed regulations are contrary to the legislative intent of the UTPCPL. First, the UTPCPL is not an antitrust law and was not enacted to be an antitrust law. Rather, the UTPCPL's "underlying foundation is fraud prevention," *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 816-17 (Pa. 1974); *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018); the purpose of the UTPCPL is not to protect competition. Indeed, no current provision of the UTPCPL that the Legislature enacted covers anticompetitive conduct at all. *See* 73 P.S. § 201-2. The Act deals solely with specifically-defined fraudulent and deceptive practices. Even the Commonwealth Court in finding that some antitrust claims could be asserted under the UTPCPL observed that "the UTPCPL is not designed to render *all* antitrust violations actionable and the scope of actionable antitrust behavior under the UTPCPL is narrower than under federal antitrust law." 206 A.3d at 60, *petition for allowance of appeal pending*.

The Legislature did not intend or believe the UTPCPL to be an antitrust law. Since enacting the UTPCPL, the Legislature (frequently at the urging of the OAG) has *more than 20 times* considered antitrust legislation, but each time has failed to enact it. Indeed, as recently as 2013, antitrust legislation in the form of Senate Bill 848 was introduced with the Attorney General's support, but the Legislature declined to enact it. Plainly, if the Legislature had intended the UTPCPL to be an antitrust law and believed that it was an antitrust law, it would not have considered and rejected antitrust legislation 20+ times over the 30 years since the UTPCPL became law.

Second, the Legislature equally did not intend the UTPCPL to apply to all economic transactions or to proscribe undefined "unfair" conduct without regard to intent or fault. Unlike the FTC Act, in the UTPCPL the Legislature specifically defined the unfair acts and practices that are deemed to be unlawful under the Act, and included the catch-all provision to cover other fraudulent or deceptive conduct, but only where it creates a likelihood of confusion or misunderstanding. The Legislature intended the UTPCPL to proscribe a broad range of *defined* bad conduct; it did not intend the Act to be unlimited or to penalize subjective "unfairness" on an ad hoc basis. Indeed, the concept of imposing ad hoc liability without prior notice of the conduct to be proscribed is antithetical to the Act and the intent to prevent misconduct in the first instance in addition to providing a remedy after the fact.

Third, the UTPCPL does not confer any authority on the OAG to approve or veto the settlement of private class actions involving UTPCPL claims, nor does it contain any suggestion of a legislative intent to do so. Given that the Pennsylvania General Authority has no authority to legislate the rules of procedure for state or federal court, *see, e.g.*, Pa. Const. Art. 5, § 10(c); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it would be impossible for the Legislature to have intended or conferred such power.

While the OAG has some rulemaking authority under the UTPCPL, that authority is limited to promulgating regulations "as may be necessary for the enforcement and administration" of the Act. The General Assembly did not grant the OAG authority to replace the Act with a new and

different law that goes far beyond, and conflicts with, the legislative policy expressed by the General Assembly in the UTPCPL.

4. The Proposed Regulations are Not in the Public Interest, as Evaluated Under 71 P.S. § 745.5b(b) of the Regulatory Review Act Because They Represent a Substantial and Unreasonable Policy Decision, are Unclear and Unnecessary, and Would Impose Undue Costs on Business and Small Business

The proposed regulations represent a substantial policy decision—one that requires legislative review. Among other things, the proposed regulations: (i) promulgate an antitrust law where the Commonwealth currently does not have one; (ii) establish a new state-law private right of action for antitrust claims; (iii) expand the UTPCPL to apply to all economic transactions, not just traditional consumer transactions, giving the OAG expansive new enforcement authority over every private economic transaction; (iv) redefine "sale" in Orwellian fashion to mean "buying" and "selling;" (v) establish a new no-fault "unfair" conduct claim, subject to treble damages and fee-shifting; and (vi) grant the OAG new power to veto the settlement of private class actions involving UTPCPL claims in any court.

There can be no dispute that these are substantial policy pronouncements—the Legislature itself has tried and failed more than 20 times to enact an antitrust law of the sort the OAG proposes to now promulgate by administrative rulemaking. Regardless whether or not these policy decisions are good or bad, they are substantial enough to call for legislative review and action. They are not appropriate for an OAG rulemaking.

The proposed regulations are unclear, unreasonable, and represent bad policy decisions. The proposed regulations foster uncertainty and are bad policy. They create new state law antitrust causes of action that are different from well-settled federal law, including a private state-law right of action that is subject to a 6-year statute of limitation, which is longer than the 4-year statute that typically applies to federal-law claims, and exposes regulated parties to different and conflicting regulatory frameworks. *See* 15 U.S.C. § 15b. At best, this throws uncertainty into the otherwise well-settled, predictable field of federal antitrust law. Given that the UTPCPL applies extraterritorially to trade and commerce that directly or indirectly affects the Commonwealth, *see Danganan*, 179 A.3d at 15-17, the proposed regulations could have far-reaching impact and interfere with and impede the work of other federal and state antitrust regulators.

The newly added definition of "unfair conduct" that will be deemed unlawful is moreover so subjective and amorphous that it cannot possibly be applied objectively or give prior notice of the conduct to be prohibited. The new definition proscribes:

> (i) conduct that "*without necessarily having been previously considered unlawful* … 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*" and
>
> (ii) conduct "*which causes substantial injury to a victim*," regardless of intent or fault.

This definition covers virtually anything, including conduct that "causes substantial injury" without regard to the actor's fault or intent. It is an inherently subjective and ad hoc standard, and bad policy.

The proposed regulations are unnecessary. There is no evidence suggesting that the existing federal antitrust regulatory regime or state-law consumer-protection law are insufficient or require new regulation to fill voids or address matters not covered by the existing law. For example, the OAG already has authority to bring treble damages antitrust actions and seek injunctive relief under federal antitrust law. 15 U.S.C. § 15(a); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972). The OAG has moreover exercised this authority consistently.[1]

It is unnecessary to introduce sweeping new regulations in the absence of any showing of a problem that needs to be fixed.

5. Conclusion

Anadarko incorporates by reference the comments submitted by other commenters in opposition to the proposed rulemaking.

For the foregoing reasons and those set forth by the other commenters, Anadarko asks the OAG to abandon its proposed UTPCPL rulemaking in its entirety. At a minimum, the OAG should withdraw the proposed rulemaking until the ongoing UTPCPL cases are decided, given that the Pennsylvania Supreme Court's decisions will likely be conclusive on the matters at issue in the proposed rulemaking.

Sincerely,

COZEN O'CONNOR

By: Stephen A. Cozen

SAC:jdb

cc: Independent Regulatory Review Commission (*via electronic submission, irrc@irrc.state.pa.us & hand delivery)*

[1] *Commonwealth ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988); *FTC v. Penn State Hershey Med. Ctr.*, 185 F. Supp. 3d 552 (M.D. Pa. 2016), *rev'd and remanded*, 838 F.3d 327 (3rd Cir. 2016); *Commonwealth v. NCAA*, 948 F. Supp. 2d 416 (M.D. Pa. 2013); *Commonwealth v. Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472 (M.D. Pa. 2006); *Commonwealth v. Playmobil USA, Inc.*, No. 1:CV-95-0287, 1995 U.S. Dist. LEXIS 20506 (M.D. Pa. Dec. 15, 1995); *Commonwealth v. Capital Health Sys. Servs.*, No. 4:CV-95-2096, 1995 U.S. Dist. LEXIS 20268 (M.D. Pa. Dec. 15, 1995); *Commonwealth v. Providence Health Sys.*, No. 4:CV-94-772, 1994 U.S. Dist. LEXIS 19849 (M.D. Pa. May 26, 1994); *Commonwealth v. Russell Stover Candies, Inc.*, No. 93-1972, 1993 U.S. Dist. LEXIS 6024 (E.D. Pa. May 6, 1993); *Commonwealth v. Milk Indus. Mgmt. Corp.*, 812 F. Supp. 500 (E.D. Pa. 1992); *Commonwealth v. Budget Fuel Co.*, 122 F.R.D. 184 (E.D. Pa. 1988); *Commonwealth v. Lake Asphalt & Petroleum Co. of Pa.*, 610 F. Supp. 885 (M.D. Pa. 1985); *see also Commonwealth v. Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d 125, 127 (4th Cir. 1983); *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 233 (9th Cir. 1976); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157 (D.D.C. 2010); *United States v. USA Waste Servs., Inc.*, No. 1:98 CV 1616, 1999 U.S. Dist. LEXIS 17577 (N.D. Ohio Sept. 20, 1999); *United States v. Waste Mgmt. Inc.*, No. 98 CV 7168, 1999 U.S. Dist. LEXIS 22921 (E.D.N.Y. May 25, 1999); *United States v. Cargill Inc.*, No. 97-CV-6161, 1997 U.S. Dist. LEXIS 12953 (W.D.N.Y. July 22, 1997).