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Insurance Federation of Pennsylvania

www.ifpenn.org

September 30, 2019

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

Re: Regulation #59-10 – Unfair Market Trade Practices – 37 Pa. Code Chapter 311

We offer the following comments on the Attorney General's proposed rulemaking published in the August 31 **Pennsylvania Bulletin**. The Insurance Federation is a non-profit trade association representing a broad cross-section of insurers in regulatory, legislative and judicial matters in Pennsylvania. We submit these comments on behalf of our members as well as our national counterparts, the American Council of Life Insurance, America's Health Insurance Plans, the American Property Casualty Insurance Association and the National Association of Mutual Insurance Companies, along with the Pennsylvania Association of Mutual Insurance Companies.

The standard of review – Section 5.2 of the Regulatory Review Act

The Regulatory Review Act is clear in the standard by which this proposed regulation should be evaluated: The overriding objective is that the regulation be in the public interest. That sounds vague, but the Act supplies more detail: "[T]he commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based."

The commission's review doesn't stop there. Even if it determines a proposed regulation is consistent with the agency's statutory authority and the underlying legislation which it implements or interprets, the commission then reviews other factors. Among those, and relevant to this proposed regulation's impact on the insurance industry, are "the clarity, feasibility and reasonableness of the regulation," including "possible conflict with or duplication of statutes or existing regulation."

The Act also emphasizes that agencies not use regulations to encroach on matters better left to the General Assembly, stating that the commission should consider "whether the regulation represents a policy decision of such a substantial nature that it requires legislative review."

For the reasons outlined below, the proposed regulation falls far short of these standards.

1. **The proposed regulation usurps a role long recognized as belonging solely to the General Assembly – whether to establish an antitrust law in Pennsylvania.**

The regulation proposes a state antitrust law for Pennsylvania, comprehensively outlining prohibited conduct, establishing (and limiting) private rights of action, and empowering the Office of Attorney General with broad investigatory and enforcement powers. That's the problem: The proposed regulation establishes a law, not implements or interprets one; agencies and regulations may do the latter, but only the General Assembly and statutes can do the former.

In fact, the OAG acknowledges that a bill is the genesis of this regulation: It notes that in the 2013-14 legislative session, the Senate Judiciary Committee considered Senate Bill 848, which would have established a state antitrust law achieving what this regulation does; similar bills have been introduced – but not passed – dating back to at least the 1989-90 legislative session.

The OAG says that at a June 25, 2013 Senate hearing, it "heard comments from the committee members and bill opponents" that the proposed bill wasn't needed in light of the Attorney General's existing powers under the Unfair Trade Practices and Consumer Protection Law, 73 Pa.S.C. Section 201-1 et seq. It says this proposed regulation is the result of those "informed comments", and presumably why it – and not the General Assembly – can establish this antitrust law.

Alleged comments from over six years ago from unnamed legislators are more informal than informed. There is nothing in the record from that hearing to suggest that sentiment guided that committee's decision to not act on the bill.

More important, nothing in the legislative record, from that session or any other session, suggests that the Senate or House has ever believed the proper route to a state antitrust law is for the OAG to promulgate a regulation pursuant to the UTPCPL. That's not found in any legislative hearings involving the OAG, as with annual budget hearings, as well as with specific bills.

State antitrust bills have been introduced and considered by the General Assembly. None have been moved out of a committee, much less been enacted. It stretches credulity to believe that this repeated inaction is because the General Assembly felt the OAG already has the powers those bills would confer, or that the General Assembly has ever considered the UTPCPL as giving the OAG the implied authority to expand that law into the realm of antitrust.

Just the opposite – the lack of legislative action is more reasonably seen as a lack of support for establishing a state antitrust law or giving such powers to the Attorney General. Further, the repeated introduction and consideration of bills establishing a state antitrust law is itself a clear manifestation that the General Assembly sees this as solely within its powers.

This is a transformational measure, and the wisdom and need for it is (and has been) the subject of legitimate debate. The proper forum for that debate isn't the IRRC process. The proper forum has been and should remain the legislative branch.

2. The proposed regulation sets up standards of "unfairness" that fall far outside the UTPCPL.

The proposed regulation cites Section 3.1 of the Unfair Trade Practices and Consumer Protection Law as its principle authority. That's the UTPCPL's regulatory authority clause, empowering the OAG to adopt such rules and regulations "as may be necessary for the enforcement and administration of this act."

The proposed regulation, however, goes well beyond enforcing and administering the UTPCPL; it instead creates new standards neither envisioned

by nor consistent with the act. That is precisely the overreach the Regulatory Review Act is designed to prevent – an agency asserting a power meant to be exercised solely by the General Assembly.

A roadmap of the relevant sections of the UTPCPL is in order:

- Section 4 of the UTPCPL empowers the OAG to take action against any person it believes is engaged in "unfair methods of competition and unfair or deceptive acts."

- Section 3 goes on to provide that "unfair methods of competition and unfair or deceptive acts" are as defined in Section 2(4) of the act and "regulations promulgated under Section 3.1" – which, as noted above, applies only to regulations that enforce and administer the act, not expand its scope.

- Section 2(4) sets forth an exhaustive definition of "unfair methods of competition" and "unfair or deceptive acts or practices," listing twenty-one acts that fall under this. As extensive as that list is, none of its prohibited acts are consistent with the acts, antitrust and more, the OAG attempts to add through this proposed regulation.

Nowhere does the UTPCPL suggest that the OAG may, on its own, add to these twenty-one acts.

The UTPCPL is clear: The OAG can go after any person who "is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful," with Section 3 referring only to the twenty-one listed acts.

The UTPCPL doesn't have a basket clause: There is no "including but not limited to" clause, or a provision that the OAG may go after any other such conduct as it determines to be unfair market trade practices or unfair or deceptive conduct. Those legislative grants of regulatory discretion are sometimes found in other laws. They are not found here, though, and they can't be presumed by the OAG.

That is, nonetheless, what the proposed regulation does. It doesn't interpret, enforce or administer any of the twenty-one prohibited acts listed in the UTPCPL; it merely repeats them in subsections (a) through (t) and (x) of its definition of "unfair methods of competition and unfair or deceptive acts or practices."

It then adds to those statutorily-prohibited acts three others – unfair market trade practices, unfair conduct and deceptive conduct. **The definitions of these three acts are the fundamental flaw of this proposed regulation: They go into areas never envisioned under the UTPCPL, and areas that are hardly clear, feasible or reasonable.**

- **"Unfair market trade practices"** are defined as ten types of conduct tied to monopolization and antitrust violations – none of which are consistent with or related to the twenty-one statutorily-listed acts in the UTPCPL. That is the point: Whether these acts should become violations of Pennsylvania law and subject to the OAG's enforcement is a decision for the General Assembly, not the OAG.

  As explained in the section below, the General Assembly has made that decision with the business of insurance: It has expressly included antitrust measures in addition to other unfair methods of competition. As a principle of statutory construction, when the General Assembly provides detailed and express powers in one area, it is presumed NOT to do so by inference or implication in other areas.

- **"Unfair conduct"** is a uniquely subjective definition. It is any conduct the OAG doesn't like, "without necessarily having been previously considered unlawful" – because the OAG believes the conduct violates some "established concept of unfairness" or believes the conduct to be unscrupulous or the like at a given moment. That's hardly clear, reasonable or feasible. It is a new standard of "unfairness du jour," in stark contrast to the General Assembly's detailed approach in enacting the UTPCPL.

- **"Deceptive conduct"** is defined as conduct which might deceive. That's so circular as to be meaningless.

The OAG cannot use this proposed regulation to incorporate acts that are neither consistent with the UTPCPL nor allowed under the UTPCPL's fairly strict and limited grant of regulatory authority. The UTPCPL gives the OAG considerable authority to combat its listed prohibited acts – but it doesn't extend that authority to any and all other acts the OAG may want to combat. That extension is reserved for the General Assembly.

3. The proposed regulation duplicates existing statutes and regulations that control the business of insurance.

The proposed regulation ignores that the business of insurance in Pennsylvania is governed by the Unfair Insurance Practices Act, 40 P.S. Section 1171,1 et seq., which acts as an insurance-specific version of the UTPCPL, but with the express addition of an antitrust provision. And insurers are also subject to antitrust measures through Chapter XIV of the Insurance Company Law, 40 P.S. Section 991.1401 et seq., known as the Insurance Holding Companies Law.

The measures in these laws are duplicative of (and arguably broader than) those in the UTPCPL and this proposed regulation, with the Insurance Commissioner empowered to enforce them, and with rights and remedies detailed in those laws.

It therefore makes no sense to include the business of insurance within this proposed regulation: We are already subject to these parameters, but with a separate regulator with insurance-specific expertise and powers.

Attached is our testimony from the June 25, 2013 hearing on Senate Bill 848; we noted then, and reiterate now, the measures in the UIPA and the Insurance Holding Companies Law. Showing how old this issue is, we raised the same concern with another bill, Senate Bill 1470, proposing a state antitrust law that was considered and rejected in 1990.

Also attached is our September 13, 2018 letter to the OAG raising this concern with the OAG's publication of a draft regulation. We may be the entity the OAG referenced in noting it "received just one comment." We never got a comment back, so we again raise this concern.

The UIPA is remarkably consistent with the UTPCPL in its language and construct. Section 4 of the UIPA prohibits "unfair methods of competition and unfair or deceptive acts or practices" in the business of insurance. Those prohibited acts are defined in detail in Section 5 of the UIPA.

Many of those acts are unique to the business of insurance and highlight that insurance conduct is controlled by the UIPA and the Insurance Commissioner, not the UTPCPL and the OAG.

Of particular import is Section 5(a)(4), which defines as an unfair practice:

> "Entering into any agreement to commit, or by any concerted action committing, and act or boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in the business of insurance."

The Insurance Holding Companies Law has similar antitrust prohibitions with reviews of insurance mergers and acquisitions. Prominent examples are Section 1402(f)(1)(ii), allowing the Insurance Department to block a merger if it would "substantially lessen competition in insurance in this Commonwealth or tend to create a monopoly therein." The same standard is set forth in Section 1403(d)(1) – with the rest of that section going into great detail on measuring markets and market shares to determine the impact on competition and likelihood of a monopoly.

Other provisions of the UIPA and other insurance laws tied to underwriting, rating and marketing of insurance also emphasize that "unfair practices" are already defined and regulated for insurance and should therefore be excused from regulation by the OAG. For instance, Section 5(a) covers deceptive conduct, with far more detail than found in the proposed regulation.

That is why we have always opposed a state antitrust law, whether by statute or regulation: The business of insurance is already subject to one; any regulation by the OAG would be duplicative or inconsistent or both, depending on the precise wording of the competing regulations or statutes. Nobody benefits from two state agencies applying matching but different laws to one industry. It isn't just the cost and expense of duplicative regulation, but the danger of conflicting conclusions by those regulators.

Maybe the OAG intends to usurp the Insurance Department's authority to implement an antitrust law for the insurance industry. We recommend against that: The Department has long-standing expertise and responsibility in this area, and it handles this role as part of a much broader spectrum of regulatory oversight. Fragmented regulation runs a close second as a flawed approach to dual regulation. In any event, transferring this authority from the Department to the OAG would clearly require legislation, not regulatory fiat.

We are happy to engage in further discussions on the issue of whether to establish a state antitrust law.

- As the Regulatory Review Act makes clear, those discussions should be through the legislative process, not the review of a regulation that attempts to bootstrap an antitrust law on to far different prohibited conduct in the UPTCPL.

- And as the Regulatory Review Act also makes clear, those discussions should acknowledge that the business of insurance should be exempted, since it is already subject to antitrust standards and more in Pennsylvania's insurance laws.

Sincerely,

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President & CEO

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From: Samuel R. Marshall
Sent: Monday, September 10, 2018 11:00 PM
To: 'antitrust@attorneygeneral.gov' <antitrust@attorneygeneral.gov>
Cc: Jonathan Greer <jgreer@ifpenn.org>; Noah Karn <nkarn@ifpenn.org>
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Re: Proposed rulemaking – 37 Pa. Code Chapter 311

We offer the following comments on the proposed rulemaking published in the August 11 **Pennsylvania Bulletin**. The Insurance Federation is a non-profit trade association representing a broad cross-section of insurers in regulatory, legislative and judicial matters in Pennsylvania.

Our read of the proposed regulation is that it effectively establishes a state antitrust law, setting forth a comprehensive outline of prohibited conduct, establishing (and limiting) private rights of action under it, and empowering the Attorney General with broad investigatory and enforcement powers. The wisdom and need for that is the subject of legitimate debate. But we believe the proper forum for that debate isn't the IRRC process and the review of this as an extension of existing agency power. Whether to make these actions unlawful, and how they are to be prosecuted and penalized, isn't a decision best done through and by the IRRC in reaction to a proposal from the Attorney General; it is a decision for the General Assembly.

Over the years, legislation doing what this rulemaking proposes has been introduced and has been the focus of committee deliberations. It hasn't been enacted, though. The proposed rulemaking notes that a matching legislative proposal was introduced over five years ago – SB 848 from the 2013-14

legislative session. That bill did not move out of committee or even get a committee vote (nor did the House consider a similar measure that session).

Further, neither chamber has seriously considered a similar measure since the one hearing held by the Senate Judiciary Committee on June 25, 2013. The proposed rulemaking says that OAG "heard comments" at that time from unnamed committee members and bill opponents that the bill wasn't needed because its objectives could readily be done by the regulation now being proposed. That's an unjustified leap: Nothing in the legislative record suggests either the Senate or the House believed the proper route was for the OAG to promulgate a regulation. There are many reasons SB 848 never moved and the issue has not been considered in the General Assembly since then, but it stretches credulity to think it is because the General Assembly would rather see a state antitrust law set up by a regulation proposed by the OAG.

That will come out in the IRRC process. But it raises a question at the outset: Why doesn't the OAG seek to have this introduced as a bill? This is a transformational measure. In the interest of good government, if it is to be established, it shouldn't be as a proposed regulation by the agency being empowered with this – it should be by the legislative branch. That's certainly true with the proposed regulation's creation of a private right of action.

As to the specific concerns of the insurance industry:

- While we question the propriety of establishing a state antitrust law by regulation, our insurance-specific concern is that we are already subject to a state antitrust law that is at least as broad as the antitrust measure proposed here. Attached is our testimony from the June 25, 2013 hearing referenced in this proposed rulemaking; we noted then, and reiterate now, the antitrust measures in Section5(a)(4) of the Unfair Insurance Practices Act and other provisions of the insurance laws, especially in the Holding Company Law with respect to mergers. Showing how old this issue is, we raised the same concern with another bill proposing a state antitrust law that was actively considered and rejected in 1990 with SB 1470.

- Our concern is therefore not so much with a state antitrust law but with the need to avoid dual regulation. Nobody benefits from two state agencies applying matching but different laws to one industry. It isn't just the cost and expense of duplicative regulation, but the danger of conflicting conclusions by those regulators.

- As to who should implement a state antitrust law for the insurance industry, we recommend that responsibility remain with the Insurance Department. It has long-standing expertise and responsibility in this area, and it handles that role as part of the much broader spectrum of regulatory oversight. Fragmented regulation runs a close second as a flawed approach to dual regulation. In any event, transferring that responsibility from the Department to the OAG would clearly require legislation.

Thank you for the chance to comment. We are happy to engage in further discussions on the issue of whether and how to establish a state antitrust law, and the need to exclude the insurance from any such law since we are already subject to it here.

Sincerely,

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June 25, 2013

To: The Honorable Members of the Senate Judiciary Committee

From: Samuel R. Marshall

Re: Senate Bill 848 – a state antitrust law

Thank you for the opportunity to be here today. I'll reiterate, with slight amplification, the concern and the recommendation we set out in our June 10 position paper. Showing we really are consistent, it is the same concern and recommendation we set out twenty-three years ago on a similar bill considered by this committee, albeit one that started with an exemption of insurance.

Our concern with Senate Bill 848 isn't that it imposes a state antitrust standard on our industry: We are, uniquely, already subject to a state antitrust law:

Section 5(a)(4) of the Unfair Insurance Practices Act makes it illegal for any one in the business of insurance to "enter into any agreement to commit, or by any concerted action committing, any act or boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

Other sections of the insurance law have similar provisions, as with the Insurance Holding Company Law that prohibits mergers that may lessen competition. Those of you who followed the Insurance Department's review of the Highmark/IBC merger application a few years ago, or its just-completed conditional approval of Highmark's merger with the West Penn Hospital System, saw an insurance-specific antitrust standard in action: There was extensive use of outside experts and public comment, with the focus on preventing uncompetitive conduct before it occurs, not just after-the-fact as is normally the case in antitrust actions.

Notably, the "tending to result" standard in the Unfair Insurance Practices Act and the "substantial lessening of competition" standard in the Holding Company Law combine to make the antitrust standards already covering insurance broader than those in Section 904 of this bill. Those standards are found in Section 904(d), but only for acquisitions of stock or other assets – ours is for any and all conduct.

So we're not asking for a lesser standard - just that there only be one regulator implementing it. Nobody benefits from two state agencies applying matching but different laws – it is not just the cost and expense of duplicative regulation, but the danger of conflicting conclusions by those regulators.

As to who should be the regulator: With all respect to the Attorney General, we recommend it be the Insurance Department. That is the agency with the expertise and responsibility for ensuring competitive and open markets for all insurers, and determining how best to attain that competition.

Given that we're already subject to a state antitrust standard, you may wonder whether we think the general business community should be, too. My colleagues from the broader business community can make their own arguments. I'd note that it might not mean much. The general business community is subject to federal antitrust review, so you have to consider whether this is a needless duplicative layer, as it would be for the insurance industry - or whether it covers some dangerous loophole in the current antitrust laws.

Thank you, again, for this opportunity. If nothing else, I hope it is a strong reminder of the thorough regulation to which the insurance industry is subject. Sometimes, my friends in the trial bar community chide me about being exempt from federal antitrust laws. That's not quite accurate, but the accurate riposte is that we are already subject to something equal to or greater than that in Pennsylvania law.

I'm happy to answer any questions.