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PA Chamber®
of Business and Industry

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Via Electronic Submission (antitrust@attorneygeneral.gov) & Hand Delivery

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:

The Pennsylvania Chamber of Business and Industry (the "PA Chamber") submits 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 rewrite and significantly expand the scope of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL" or the "Act").

The proposed regulations, if finalized in their current proposed form, will have a substantial and far-reaching impact on our members, including our small business members, by: (i) declaring unlawful "unfair" conduct that is so broadly defined that no business could prospectively comply; (ii) creating a new antitrust law without a legislative mandate; (iii) imposing substantial new litigation risk and costs for business by expanding the UTPCPL to allow for no-fault "unfair" conduct claims that carry the potential for treble damages and fee-shifting regardless of fault; and (iv) giving the OAG new authority to approve or reject settlements of private class actions involving UTPCPL claims. We strenuously oppose the new regulations for the reasons explained more fully below.

1. The PA Chamber

The PA Chamber is the Commonwealth's largest broad-based business advocacy association, whose membership comprises close to 10,000 member businesses of all sizes and industry sectors throughout the state—from sole proprietors to Fortune 100 companies— representing nearly 50 percent of the private workforce in the Commonwealth. The PA Chamber's mission is to articulate and advocate on public policy issues that will expand private sector job creation and lead to a more prosperous Pennsylvania for all its citizens. The PA Chamber serves as the

frontline advocate for business growth. Once laws and regulations are enacted, the PA Chamber is dedicated to helping our members understand and easily follow the complexities of complying with state and federal workplace rules.

2. The OAG's Proposed Regulations 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:

First, 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 adds an antitrust law, by administrative rulemaking, onto a consumer protection law.

Second, 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." 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.

Third, 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.

Fourth, 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.

3. Standard of Review of Proposed Regulations

The Regulatory Review Act ("RRA") provides a comprehensive regulatory review process for rulemaking that applies to all proposed regulations, including those offered by the OAG. The RRA was enacted out of concern by the General Assembly that regulations were being promulgated "without undergoing effective review concerning... conformity to legislative intent," among other things. 71 P.S. §745.2(a). The RRA is intended to "establish a method for

ongoing and effective legislative review and oversight," and "provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function," among other things. *Id.*

The RRA establishes specific criteria for review of proposed regulations to determine whether they are in the public interest. "[F]irst and foremost, [the IRRC and standing committees] 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." 71 P.S. §745.5b(a). "In making its determination, the [IRRC] shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General." *Id.*

If the primary criteria—i.e., statutory authority to promulgate the regulation and conformity with legislative intent—are satisfied, then the IRRC also evaluates the following criteria, 71 P.S. §745.5b(b):

> (1) Economic or fiscal impacts of the regulation, which include the following:
>
> > (i) Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector.
> >
> > (ii) Adverse effects on prices of goods and services, productivity or competition.
> >
> > (iii) The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors.
> >
> > (iv) The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur.
> >
> > (v) The impact on the public interest of exempting or setting lesser standards of compliance for individuals or small businesses when it is lawful, desirable and feasible to do so.
>
> (2) The protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.
>
> (3) The clarity, feasibility and reasonableness of the regulation to be determined by considering the following:
>
> > (i) Possible conflict with or duplication of statutes or existing regulations.
> >
> > (ii) Clarity and lack of ambiguity.
> >
> > (iii) Need for the regulation.

(iv) Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

(v) Whether acceptable data is the basis of the regulation.

(4) Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

(5) Comments, objections or recommendations of a committee.

(6) Compliance with the provisions of this act or the regulations of the commission in promulgating the regulation.

(7) Whether the regulation is supported by acceptable data.

(8) Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.

The OAG's proposed regulations neither conform to the General Assembly's legislative intent, nor are in the public interest, as evaluated under the factors set forth in the RRA.

4. The Proposed Regulations are Inconsistent with and 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 as enacted by the Legislature covers anticompetitive conduct. *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." *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, 60 (Pa. Cmwlth. 2019), *petition for allowance of appeal pending.*

Perhaps the best evidence that the Legislature did not intend the UTPCPL to be an antitrust law is the fact that, 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. Surely, if the Legislature had intended the UTPCPL to be an antitrust law and believed that it was, it would not have consistently taken up antitrust legislation 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.

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.

Plain and simple, the OAG is attempting to usurp the power of the General Assembly. The OAG is a constitutional office of defined, and limited, powers. Under the Pennsylvania Constitution, the Attorney General "shall exercise such powers and perform such duties as may be imposed by law." Pa. Const. art. 4, § 4.1. As the Pennsylvania Supreme Court has held, those powers are "strictly a matter of legislative designation and enumeration" and consequently "legislation enacted by the General Assembly is the exclusive source of the powers and duties of the elected Attorney General pursuant to Article IV, Section 4.1." *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986) (citation omitted). It is the General Assembly that defines the powers of the OAG, not the other way around, and the OAG cannot grant itself new powers and authority that the Legislature has specifically declined to confer on it.

5. The Proposed Regulations are Not in the Public Interest, as Evaluated Under 71 P.S. § 745.5b(b) 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) establish a new no-fault "unfair" conduct claim, subject to treble damages and fee-shifting; and (v) 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. A basic principle of the rule of law is that the rules are clear enough to be complied with prospectively, not simply penalties imposed on an ad hoc basis after the fact. The proposed regulations fail that test at the most basic level. The newly added definition of "unfair conduct" that will be deemed unlawful is so amorphous that no business could possibly comply prospectively. 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.

Moreover, the stakes of noncompliance are incredibly high. Given the amorphous "unfair conduct" standard and the proposed regulations' expansion of the UTPCPL to cover all economic transactions, any dispute with a counter-party will become a UTPCPL claim, subject to potential treble damages and fee-shifting, without regard to fault or intent. For example, would a business become responsible to evaluate the buyer's ability to afford a product he or she buys with third-party financing. If the buyer defaults and the product is later repossessed, could the seller be held liable for acting "unfairly" in allowing the consumer to buy something he or she could not afford. The consumer would surely claim "substantial injury", and since the seller's intent and fault do not matter, the seller would be left to defend a UTPCPL claim. This will certainly drive up litigation risk, settlement pressure, and settlement costs for business and small business, again, without regard to fault or intent and regardless of whether the "unfair" conduct was previously considered unlawful. That is not good policy, it just creates uncertainty.

The proposed regulations foster uncertainty and are bad policy in other ways as well. 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 businesses 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 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.

The proposed regulations impose undue costs, including on small businesses, and would have an adverse economic impact. As explained above, the effect of the proposed regulations will be to vastly expand suits asserting UTPCPL claims, which under an "unfair conduct" theory would not require proof of fault or intent, or a showing that anyone had previously considered the conduct to be unlawful. Such claims carry outsize litigation and damages risk given the lack of an intent requirement, treble damages exposure, and fee-shifting risk. They will be costlier and riskier to defend and considerably costlier to settle, regardless of whether the claims have merit or not.

6. The Proposed Rulemaking is Premature

The OAG specifically references *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51 (Pa. Cmwlth. 2019), *petition for allowance of appeal pending*, as a basis for the proposed rulemaking, and many of the proposed regulations derive from the OAG's arguments and interpretation of the Commonwealth Court's decision in that matter, including specifically the proposed antitrust law and expansion of regulated "trade and commerce." The proposed rulemaking also adds new catch-all provisions designed to broaden and change the existing catch-all provision in the Act, the scope and interpretation of which is at issue in *Gregg v. Ameriprise*, 195 A.3d 930 (Pa. Super. 2018), *appeal granted,* No. 490 WAL 2018, 2019 WL 2635642 (Pa. June 27, 2019).

The Supreme Court of Pennsylvania granted allowance of appeal in *Gregg*, and the appeal is pending. The petitioners in *Anadarko Petroleum* have filed petitions for allowance of appeal to the Supreme Court, and those petitions are pending. Both UTPCPL cases thus remain in active litigation, and the determinations of the intermediate appellate courts are not final. Given the lack

[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).

of finality, it is premature for the OAG to try to transpose its view of the holdings of those cases into an administrative rulemaking.

7. The OAG is Conflicted from Passing on the Legality of the Proposed Regulations

Under the RRA, the OAG is typically tasked to opine on the form and legality of a proposed regulation before it becomes final. Here, however, as the agency proposing the regulation, the OAG is conflicted from opining as to its form and legality, particularly given the substantial questions explained above and by other commenters as to the propriety and legality of the proposed rulemaking. Under these circumstances, the OAG should not be permitted to opine as to the form and legality of its own proposed regulations; an independent third-party must do so.

8. Conclusion

For the foregoing reasons, the PA Chamber asks the OAG to abandon its proposed rulemaking in its entirety. At a minimum, the OAG should withdraw the proposed rulemaking until the active UTPCPL cases are decided, as the final determinations in those cases are likely to be conclusive on the issues that are the subject of the proposed rulemaking.

Sincerely,

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