#3242

ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Mark S. Stewart
717.237.7191
mstewart@eckertseamans.com

September 30, 2019

Via Hand Delivery and Email
Tracy W. Wertz
Chief Deputy Attorney General
Antitrust Section
14th Floor, Strawberry Square
Harrisburg, PA 17120

RE: Proposed Regulation #59-10 on Unfair Market Trade Practices

Dear Ms. Wertz:

On behalf of the Pennsylvania Coalition for Civil Justice Reform (the "Coalition"), we respectfully submit the following comments on the Pennsylvania Attorney General's proposed rulemaking #59-10, which will purportedly add regulations on unfair market trade practices to the Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1, *et seq.*) (the "CPL"). The Coalition is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, nonprofit entities and taxpayers, and is dedicated to bringing fairness to the courts by elevating awareness of civil justice issues and advocating for legal reforms.

General Comments

The Coalition recognizes the Attorney General's authority to define and clarify terms under the CPL. The proposed rulemaking, however, far exceeds that authority, creating anti-trust law without legislative action, enacting new and expansive "catchall" provisions, and

proposing to regulate conduct that is beyond the scope of the Attorney General's authority under the CPL.

The General Assembly has, to date, refrained from enacting antitrust legislation that would prohibit practices alleged to be anticompetitive. Notwithstanding this fact, the Preamble to the proposed rulemaking provides that "unfair market trade practices" are unfair methods of competition and unfair or deceptive acts in violation of CPL. The Office of Attorney General (hereinafter "OAG") then asserts that "Pennsylvanians have been disadvantaged by a 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 anticompetitive conduct" and that the OAG has made the determination that it will "remedy this unfair vacuum under state law." *Preamble, pg 2, Section E.2.* Such action, however, is beyond the authority delegated to the OAG under the CPL.

Administrative agencies are not empowered to make regulations that exceed the power given them by their enabling statute. Rather, the power to prescribe rules is confined to those areas that "carry into effect the will of the Legislature, as expressed by statute." *Pa. Ass'n of Life Insurance Underwriters v. Cmw. Dept. of Ins.*, 371 A.2d 564 (Pa.Cmwlth.1977). As such, an agency "cannot confer authority upon itself by regulation. Any power exercised by an agency must be conferred by the legislature in express terms." *Marcellus Shale Coalition v. Dept. of Environmental Protection*, 193 A.3d 447 (Pa.Cmwlth. 2018). While an agency is empowered to promulgate regulations prescribing the rules, "it must do so in manner not inconsistent with the law." 71 P.S. § 186.

The CPL is a fraud prevention statute, and is to be construed liberally to effectuate the goal of placing consumers and purchasers of household goods and services on "more equal footing with sellers" in consumer transactions. *See Com. by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974) and *Com. v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010 (Pa. 2018). Through the catchall provision of the CPL, which generally prohibits the conduct of "engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding", the proposed rulemaking attempts to bootstrap antitrust regulations. *See* 71 P.S. § 201-2(xxi). The plain language of the CPL, however, does not apply to the acts that the rulemaking seeks to regulate, acts that the OAG has declared to be anticompetitive, nor does the CPL address or prohibit conduct between market participants in the conduct of all trade and commerce. These objectives, however, are the stated policy goals of the OAG in promulgating these regulations, which will result in an expansive rewriting of the CPL with no legislative authority to do so.

In support of its position, the OAG cites to several Pennsylvania cases. *See Monumental Properties*, 329 A.2d 812 (Pa. 1974) and *Anadarko Petroleum Corp. v. Com.*, 206 A.3d 51 (Pa. Cmwlth. 2019). These cases, however, are not demonstrative of, nor do they support, the OAG's contention that it has the authority to create antitrust provisions absent legislative action, as they are factually distinguishable from the scenario presented herein.

The only issue before the Court in *Monumental Properties* was whether a household lease agreement that included language and provisions that were alleged to be misleading and confusing fell within the catchall provision of the CPL, when such household leases were not covered under one of the more specific provisions of the CPL. As the issue related to alleged

fraud in a consumer transaction, the Court stated that the cannon of statutory construction, *enjusdem generis,*[1] is "but one of construction and does not warrant a court in confining the operation of a statute within the narrower limits than intended by the legislature." *Monumental Properties,* 329 A.2d at 827 (Pa. 1974) (emphasis added).

While the OAG's Preamble asserts that the Court rejected the application of this doctrine of statutory construction all together as a applied to the CPL (and, thus, applied this interpretation into the proposed rulemaking in Section 311.11(b)), such assertion is a misstatement of the Court's reasoning and holding. The Court did not abrogate the cannon of statutory construction in all instances in which the CPL was being interpreted. Rather, when the purpose intended by the legislature was clear, the Court would not confine catchall language to a meaning narrower than that which was intended by the legislature to effectuate the statute's overall purpose. Here, the OAG is attempting to do the converse by adding provisions to the CPL that the legislature never intended to include in the law. *See also Anadarko,* 206 A.3d 51 (Pa. Cmwlth. 2019) (the mere existence of joint venture and market share agreements does not violate the CPL, as the CPL "is not designed to render *all* antitrust violations actionable..." unless the activities otherwise fall into one of the categories of behavior deemed actionable under the CPL).

Just as the *Monumental Properties* and *Anadarko* cases do not support the position that the OAG can promulgate regulations that incorporate antitrust provisions applicable to all market

[1] This cannon of statutory construction provides that "where the general words of a statute follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *McClellan v. Health Maintenance Org. of Pa.,* 686 A.2d 801 (Pa. 1996).

participants into a statute designed to protect consumers against fraudulent practices of sellers, the OAG's reliance on the Federal Trade Commission Act (15 U.S.C. § 41-58, *et seq.*) (hereinafter "FTCA") is also not dispositive. The Preamble makes repeated reference to Section 5 of the FTCA, asserting that the OAG has determined that it "logically follows that a violation of Section 5 of the FTCA constitutes a violation of the act [CPL] because such a conclusion incontrovertibly falls within the scope of the Legislature's basic policy choice in the act..." *Preamble, pg. 3.* The Preamble, however, does not address or discuss the fact that federal law is more encompassing than Pennsylvania's CPL, as Congress has specifically enacted antitrust laws, as have most other states to varying degrees. Our General Assembly, however, to date, has not – although antitrust provisions have been introduced and debated for nearly 50 years. As such, the OAG's reliance on a comparison between the CPL and FTCA is misplaced.

Comments on Specific Provisions

As to the specific provisions of the rulemaking that are proposed to be added as a new Chapter 311, we provide the following comments. First, throughout the rulemaking, statutory provisions of the CPL are restated, often with the OAG's additions or amendments. Repeating the language of the statute into the rulemaking is not necessary. Furthermore, adding to or amending the statutory language to incorporate the provisions of the OAG's rulemaking, as a means to make actionable under the CPL conduct that the OAG has deemed to be unlawful by regulation, is not proper and should, thus, be eliminated. All the OAG is attempting to do is to take CPL provisions that are triggered by a violation of Section 201-3 or by an action under Section 201-4 of the CPL and make them applicable to the rulemaking and the OAG's new antitrust and catchall provisions. This comment impacts Section 311.2 (relating to definitions),

Section 311.3 (relating to unlawful acts or practices; exclusions), Section 311.4 (restraining prohibited acts), Section 311.5 (relating to payment of costs and restitution), Section 311.6 (addressing assurances of voluntary compliance), Section 311.7 (relating to civil penalties), Section 311.8 (relating to forfeiture of franchise or right to do business; appointment of receiver), and Section 311.9 (relating to private actions).

Regarding Section 311.2, the term "unfair market trade practices" is not provided in the CPL and, as discussed supra, the OAG has no authority to enact new provisions to the CPL. Furthermore, not all conduct articulated as an unfair market trade practice may, in fact, be unlawful anticompetitive conduct, as there may be legitimate and lawful business reasons, unrelated to anticompetitive conduct, for a market participant to engage in the conducted provided in this section.

A second major flaw in the proposed rulemaking is the addition of two new catchall provisions to the list of unfair and deceptive acts or practices. Section 311.2 repeats the litany of unfair and deceptive acts and practices set forth in § 201-2(4) of the CPL, but adds "unfair conduct" and "deceptive conduct." When considered with the definitions supplied to those terms, the regulation does much more than interpret and apply the CPL, it expansively adds to the law.

The definition of "unfair conduct" is outrageously broad and does not provide an ascertainable standard as to what conduct is actually being regulated or prohibited. Rather, the standard articulated is purely subjective, particularly as it purports to regulate conduct that is not even unlawful but is "within at least the penumbra of... [any] other established concept of unfairness." This definition is unconstitutionally vague, ambiguous, does not provide sufficient

specificity as to the conduct being regulated, is likely to cause confusion, and, therefore, must be stricken.

The definition of "deceptive conduct" is equally problematic. The definition provides insufficient guidance as to the covered conduct because it utilizes the same word to define itself. *See* Pennsylvania Code & Bulletin Style Manual § 2.11(h) (prohibiting inclusion in part of the definition of the term being defined). Moreover, the inclusion of deceptive conduct as an additional, and new, catchall, is duplicative of the existing catchall in the CPL, which already covers deceptive conduct that is actionable if it "creates a likelihood of confusion or of misunderstanding." *See* 73 P.S. § 201-2(4)(xxi).

Regarding the definition of "moneys or property, real and personal" the rulemaking incorporates items into the definition that could be recoverable by the OAG under Section 311.5, including attorneys' fees, expert fees, investigation and litigation costs. Inclusion of these items into the definition is not consistent with the plain meaning of these terms, as the common usage of money and property does not include attorney's fees, etc. Furthermore, the OAG does not have the authority to expand that which is recoverable under the CPL. Where the General Assembly intended to include the ability to recover reasonable attorney's fees and costs, it did so. *See* 71 P.S. § 201-9.2. (providing that "the court may award to plaintiff... costs and reasonable attorney fees."). Attorneys' fees, expert fees, investigation and litigation costs should, therefore, be excluded from the definition of moneys or property, real or personal.

As to Section 311.9 (relating to private actions), the OAG does not have the authority to create a new private cause of action for anticompetitive conduct between market participants, absent legislative action. Furthermore, the creation of additional claims that can be raised via a

private cause of action will have financial impacts on businesses in the Commonwealth, irrespective of whether such claims are ultimately determined to be meritorious by the courts. Based on Section 19 of the Regulatory Analysis Form accompanying this rulemaking, however, it does not appear that the OAG has even considered these costs to the regulated community – a regulated community that would be substantially expanded under this rulemaking to include any business considered to have done something "unfair" as defined. We also note that even recent antitrust legislation introduced in the General Assembly did not propose to authorize a private cause of action for alleged violations of antitrust provisions, providing that only the OAG could bring a civil action on behalf of the Commonwealth. *See* SB848, 2013-2014 Regular Session. The OAG has no authority to amend statutory language as to the methods, acts or practices declared unlawful under Section 3 of the CPL to include the OAG's newly created catchall causes of action contained in Section 311.3 as a means to make unlawful such additional actions.

As to subsections (c) and (d) of Section 311.9, which prohibits the release of claims without written consent from the OAG and provides that no person has standing to question the authority of the legal representation of the Commonwealth and its citizens by the OAG, neither of these provisions appear in the language of Section 201-9.2 of the CPL. As such, the OAG has no authority to add them to the CPL. Further, the conduct contained in these provisions is not within the purview of the OAG to regulate or prohibit. The OAG has no legal authority to prohibit the private release of claims when parties elect to settle, and cannot require its consent to do so. Nor is there any need for the OAG's consent, as private parties cannot release or impact any rights of the Commonwealth. As to the issue of standing, that is a legal determination within the purview of the courts.

Regarding Section 311.10 (relating to Subpoena Power), the OAG cannot grant itself subpoena power by utilizing the rulemaking authority under the CPL. The OAG's administrative subpoena power is derived from the Administrative Code of 1929, 71 P.S. § 307-2 and 307-3, and is limited by the parameters of the Bureau of Consumer Protection. While there may be other statutes that address the OAG's authority to subpoena witnesses and documents, the authority to do so does not come from the CPL. Furthermore, the Administrative Code's subpoena authority was not amended by 71 P.S. § 732-204(d) of the Commonwealth Attorney's Act, as asserted in this section of the rulemaking. Rather, Section 732-204(d) merely provides that the OAG has the "authority to administer the provisions relating to consumer protection... and appoint an advisory committee..." Nothing about Section 732-204(d) amended, abrogated, or otherwise changed the Administrative Code as the source of the Attorney General's administrative subpoena power in consumer matters or nullified or eliminated the restrictions and limitations on that power in the Administrative Code. For these reasons, the CPL's rulemaking authority does not extend to the Attorney General's administrative subpoena power and this provision should be eliminated.

Finally as to Sections 311.11 (relating to Interpretation) and 311.12 (relating to Waiver of Rights), the issues contained within these provisions of the proposed rulemaking are not within the purview of the OAG to decide or regulate, but are matters for the legislature to enact or the court to determine.

Based on the forgoing reasons, we respectfully request that the Office of Attorney General rescind and/or substantially revise its rulemaking, ensuring that any future proposals are consistent with the authority delegated to the OAG under the CPL.

Sincerely,

Mark S. Stewart

cc:
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
Honorable Brad Roae, Chair, House Consumer Affairs Committee
Honorable Robert F. Matzie, Democratic Chair, House Consumer Affairs Committee
Mike Vereb, Director of Government Affairs, Office of Attorney General
Amy Elliot, Chief Deputy Attorney General, Legal Review, Office of Attorney General