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energy API | Associated Petroleum Industries of **Pennsylvania**
A Division of the American Petroleum Institute

September 30, 2019

Ms. Tracy W. Wertz
Antitrust Section
Pennsylvania Office of Attorney General
Strawberry Square
14th Floor
Harrisburg, PA 17101
antitrust@attorneygeneral.gov

Re: Proposed Regulation at 37 Pa. Code Ch. 311, Regarding Unfair Market Trade Practices

Dear Ms. Wertz:

Associated Petroleum Industries of Pennsylvania (API-PA) is pleased to offer comments on the Proposed Rulemaking Regarding Unfair Market Trade Practices ("Proposed Rules"). *See* 49 Pa. Bull. 4993 (August 31, 2019). API regularly comments on proposed regulatory and statutory provisions related to antitrust and unfair competition issues and submits briefs as an *amicus curiae* in cases that raise important issues under the antitrust laws.[1] Accordingly, please find our comments and suggestions attached.

API-PA is a division of the American Petroleum Institute (API), which represents all segments of America's oil and natural gas industry. API, which started as a standards-setting organization, has developed almost 700 standards to enhance the safety of our workers and protect the community and environment – standards the world looks to as a guide. Its more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 47 million Americans.

Thank you for the opportunity to offer comments on this proposed rulemaking. Please contact me if you have any questions or if additional information is needed regarding our comments.

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[1] *See*, e.g., API's Amicus Curiae Br., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); API's Amicus Curiae Br., *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

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Sincerely,

Stephanie Catarino Wissman
Executive Director

API-PA Comments

API supports well-conceived improvements to the various laws regulating competition to ensure both consumers and businesses benefit from the competitive process. However, in this case, it appears that the attempt to clarify the scope of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") lacks adequate factual and legal support and is likely to have adverse results. Specifically, the Proposed Rules would define certain commercial actions as "unfair market trade practices," which are categorically prohibited under the UTPCPL. For conduct such as horizontal price fixing, such an across the board prohibition is justified and consistent with the substantive requirements of the federal antitrust laws and many other states. However, the Proposed Rules would go much further, by defining entire categories of prohibited conduct even though the activities at issue may actually be procompetitive in some circumstances and, at a minimum, have not been shown to be clearly anticompetitive.

The Proposed Rules are significantly overbroad and would impose new substantive law in Pennsylvania that differs from federal law and that of many other states. If enacted, conduct that is commonplace in the economy could become subject to automatic, across-the-board condemnation in Pennsylvania. This would introduce a significant variation between Pennsylvania state law and federal antitrust laws, where the default rule of analysis is the rule of reason except for a small number of defined *per se* violations. The departure is likely to lead to over-enforcement of otherwise efficient conduct, thereby discouraging businesses from introducing novel products and ideas in Pennsylvania.

The proposed Pennsylvania restrictions are made even more problematic by the expansive private right of action in the Proposed Rules. Providing for recovery of treble damages and attorney fees for ubiquitous conduct such as exclusive supply agreements could inundate the Pennsylvania court systems with frivolous lawsuits.

For these reasons, API respectfully suggests that the Proposed Rules not be issued in their present form. Further consideration by both the executive and legislative branches is needed to ensure that Pennsylvania law protects the Commonwealth's consumers and businesses while not restricting innovative competitive practices that are critical to economic growth and prosperity.

I. Several of the Practices Designated as "Unfair Market Trade Practices" Are Not *Per Se* Illegal Under Federal Antitrust Laws

As the Proposed Rules acknowledge, Section 3 of UTPCPC (73 P.S. § 201-3) closely tracks Section 5 of the Federal Trade Commission Act ("FTC Act"), which similarly contains a general prohibition against unfair trade practices. Pennsylvania courts look to decisions under Section 5 of the FTC Act for guidance. Proposed Rules, E.3. Although Section 5 is broadly worded, the substantive scope of Section 5 *as applied to alleged anticompetitive conduct* has been generally limited to conduct within the scope of the Sherman, Clayton Act, and Robinson-Patman Acts. *See, e.g., Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise*

Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (*Ethyl*).[2]

Under federal antitrust laws, courts analyze potentially anticompetitive conduct through one of two frameworks: (1) the *per se* rule, or (2) the rule or reason. The *per se* rule applies to a conduct that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 19-20 (1979) (citation omitted). Under the *per se* rule, a conduct is deemed unlawful without further analysis into the precise harm or the business justifications. Because of the severity of the *per se* rule, the Supreme Court has said on numerous occasions that courts classify a conduct as *per se* illegal only after "considerable experience" with that conduct. *See United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violation of the Sherman Act."); *Broadcast Music, Inc.*, 441 U.S. at 9-10. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Conduct deemed to be *per se* illegal includes: naked price fixing, output restrictions, territorial allocations, and bid rigging. *See United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (price-fixing agreements among competitors are *per se* unlawful); *Topco Associates*, 405 U.S. 596 (horizontal market division is *per se* illegal); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market division agreements are unlawful); *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985) (bid rigging as *per se* illegal).

Any potentially anticompetitive conduct not analyzed under the *per se* rule is analyzed under the rule of reason. Under the rule of reason analysis, the inquiry is whether the conduct's anticompetitive effect substantially outweighs the procompetitive effects. *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 504 (2d Cir. 2004) ("[T]he factfinder must engage in a careful weighing of the competitive effects of the agreement – both pro and con."). The rule of reason is the presumptive framework for most conduct.

The Proposed Rules pronounce unlawful all unfair methods of competition and unfair or deceptive acts or practices. *See* Proposed Rules, Annex A at § 311.3. Unfair methods of competition are defined to include, among others, unfair market trade practices, *id* at § 311.2, which in turn includes a list of specific conduct. The effect of §§ 311.2 and 311.3 is that conduct that is governed under the rule of reason under federal and many states antitrust laws – (a) vertical minimum resale price maintenance, (b) tying/bundling, (c) exclusive dealing, and (d) concerted refusal to deal – would become *per se* illegal in Pennsylvania. Adopting such broad and sweeping prohibitions on conduct not considered anticompetitive in all circumstances

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[2] The FTC routinely uses its broad authority under Section 5 to challenge various types of fraudulent or deceptive conduct similar to that described in definitions (a) through (t) of the proposed definition "unfair methods of competition" and "unfair or deceptive acts or practices" in the Proposed Rules. In contrast, courts in cases such as *Official Airline Guide, Boise Cascade*, and *Ethyl* have curtailed attempts by the FTC to prohibit practices deemed to be anticompetitive but outside the scope of the core federal antitrust statutes.

would be a drastic and significant departure from federal antitrust laws and the modern consensus on the appropriate scope of antitrust enforcement.

A. *Definition (i) Under Unfair Market Trade Practices (Proposed Rules, Annex A at § 311.2)*

Definition (i) under "Unfair market trade practices" appears to target minimum resale price maintenance. The U.S. Supreme Court held in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* that vertical minimum resale price maintenance is not *per se* illegal. 551 U.S. 877 (2007). The Supreme Court explained that minimum resale price maintenance can stimulate interbrand competition by reducing or eliminating intrabrand price competition and encouraging non-price competition among retailers. *Id.* at 890-92. The Court was also skeptical whether resale price maintenance could be abused by a manufacturer or a retailer without market power. *Id.* at 897.

By defining "unfair market trade practices" to include vertical resale price maintenance, *see* Proposed Rules, Annex A at § 311.2, the Proposed Rules potentially render the rule of reason irrelevant when analyzing vertical resale price maintenance. To establish a violation, plaintiffs would be required to show only that vertical resale price maintenance took place. Resale price maintenance that benefits consumers by encouraging non-price competition among retailers, and resale price maintenance where the retailers or manufacturers involved have very little market power and so little or no ability to harm competition, would be deemed *per se* illegal despite the Supreme Court's decision in *Leegin*.

Although States may choose to depart from federal law, administrative agencies may not enact a major departure from clear federal precedent through an administrative interpretation of a statute that Pennsylvania courts have held should be interpreted consistent with federal precedent. This portion of the Proposed Rules is also squarely inconsistent with various explanatory descriptions provided in the Regulatory Analysis Form accompanying the Proposed Rules:

- "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 law***." (Section 7) (emphasis added)
- "There are no provisions in the proposed rulemaking that are more stringent than federal standards." (Section 11)

While some states have chosen not to follow the federal rule on minimum resale price maintenance, they have generally done so through legislative action. Although the Proposed Rules claim to merely "clarify" existing law, in reality they would adopt a significant substantive change in Pennsylvania law through administrative regulation.

B. Definition (iii) Under Unfair Market Trade Practices (Proposed Rules, Annex A at § 311.2)

Definition (iii) broadly prohibits any agreement "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." While apparently aimed at tying agreements, this provision is written so broadly that it could potentially apply to any sales agreement that provides more favorable pricing for goods or services purchased together. Even if limited to the traditional federal antitrust violation of "tying," the Proposed Rule significantly expands the scope of prohibited conduct. Tying is subject to a modified *per se* rule that applies only if the plaintiff can show that the seller has market power to force customers to purchase the tied product. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-18 (1984). The test that courts use to apply the *per se* test resembles a rule of reason inquiry. *See e.g., PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997) (*per se* and rule of reason tying tests have merged in recent years).

By defining "unfair market trade practices" to include any agreements that "have the effect of conditioning the sale of one article of trade or commerce upon the purchase of another" the Proposed Rules potentially nullify years of precedent regarding tying and flatly prohibit all agreements that provide a buyer a significant incentive to purchase products as a package. A small independent retailer providing a discounted loaf of bread with the purchase of a gallon of milk would potentially be engaged in an unfair market trade practice under the Proposed Rules. Such an outcome is presumably not intended but would result from a literal reading of the proposed language.

C. Definition (v) Under Unfair Market Trade Practices (Proposed Rules, Annex A at § 311.2)

Definition (v) under "Unfair market trade practices" suffers from the same overbreadth concerns. While the regulatory preamble describes this definition as addressing "reciprocal dealing," the regulatory text is much broader, and covers any agreement "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." Many forms of legitimate cooperative arrangements could be caught by this definition of prohibited conduct. For example, two small orchards who agree to sell surplus supplies of fruit to each other (e.g. Orchard A sells excess apples to Orchard B while agreeing to purchase surplus peaches form Orchard B) would be in violation of this rule. What is clearly absent in the scenario is any harm to competition or consumers, yet the Proposed Rules enact a categorical ban.

Even the narrow offense of reciprocal dealing, which has been rarely litigated in recent years, has developed to include a rule of reason analysis to avoid such an over inclusive prohibition. Some courts have applied a tying analysis with respect to reciprocal dealing, which would implicate the modified *per se* rule that requires a showing of market power described above. *See, e.g., Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986). Courts have also been reluctant to hold reciprocal dealing unlawful without substantial

foreclosure of commerce. *See id.* at 540 (no anticompetitive effect when buyer simply terminates at-will contract with one supplier and enters not similar at-will contract with another).

By defining "unfair market trade practices" to include reciprocal dealing, *see* Proposed Rules, Annex A at § 311.2, the Proposed Rules potentially render the coercion and foreclosure inquiry irrelevant. Plaintiffs could establish a violation of the proposed rule simple by showing that the existence of an agreement requiring an exchange of products between two independent companies exists, regardless of how sensible and beneficial to consumers the agreement might be.

D. Concerted Refusals to Deal Under Unfair Market Trade Practices (Proposed Rules, Annex A at § 311.2)

The federal antitrust laws have adopted a nuanced treatment of concerted refusals to deal. The Supreme Court has held that not all horizontal refusals to deal are *per se* illegal. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985). Indeed, the Supreme Court found that the *per se* approach is limited to cases where firms with market power boycott suppliers or customers to discourage them from doing business with a competitor. *FTC v. Indiana Federation of Dentist*, 476 U.S. 447 (1986). The Supreme Court has also found refusal to deal *per se* illegal if it is reinforcing price-fixing agreements. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Vertical refusal to deal is even more nuanced, as courts would consider whether the refusal to deal is motivated by the desire to facilitate a *per se* illegal restraint or other legitimate business reasons.

By defining "unfair market trade practices" to include all concerted refusal to deal, *see* Proposed Rules, Annex A at § 311.2, the Proposed Rules potentially make the market power and motivation analysis irrelevant, thus oversimplifying the analysis of complex arrangements that merit different treatments in different settings. Purchasing or marketing cooperatives serving small businesses in Pennsylvania would be at significant risk of challenge under the Proposed Rules.

II. Consumers Could Be Harmed if Efficient Conducts Are *Per Se* Illegal

The overbroad prohibitions on competitively neutral or even beneficial conduct described above are likely to harm Pennsylvania consumers as well as Pennsylvania businesses. The risk of being accused of violating the greatly expanded UTPCPL could discourage businesses from introducing novel products or ideas in Pennsylvania. Under the *per se* condemnation enacted by the Proposed Rules, the government would only need to show that the conduct took place, without evaluating whether the anticompetitive effects outweigh the procompetitive effects. The

heightened legal risk from operating in Pennsylvania could discourage businesses from introducing novel products and services, thus harming Pennsylvania consumers.[3]

III. Applying the *Per Se* Rule Could Incentivize Frivolous Private Litigation

The Proposed Rules could also lead to a significant increase in frivolous lawsuits aimed at extracting settlements. The Proposed Rules provide for a private right of action to recover the three times the damages suffered. Proposed Rules, Annex A at § 311.9 ("The court may, in its discretion, award up to three times the actual damages sustained."). As discussed in Section I, the Proposed Rules could effectively render many categories of conduct *per se* illegal. Consequentially, unlike under present law, plaintiffs may only need to show that the conduct took place, without having to show that anticompetitive effects of the conduct outweigh the procompetitive effects, and thus lowering the standard of proof for plaintiffs. The lowering of the standard of proof and the possibility of tremble damages would lead to a dramatic increase in private lawsuits, particularly given that the prospect of fee awards even for cases that result in nominal recoveries would incentive increased litigation.

Moreover, even if courts were to impose on plaintiffs a standard of proof similar to that under Section 5 of the FTC Act (which does not have a private right of action), the courts may arrive at such conclusion only after numerous lawsuits. In the meantime, defendants would be less likely to prevail on a motion to dismiss as courts grapple with the ramifications of the Proposed Rule. As a result of years of procedural developments, federal antitrust defendants are able to escape non-meritorious challenged by showing a lack of coercion, substantial foreclosure, and/or market power adequately alleged in the complaint with respect to tying or other allegations involving vertical restraints. The Proposed Rules would significantly expand the scope of substantive antitrust law in Pennsylvania while raising numerous procedural questions as to how such actions would be litigated. Such a dramatic change in the legal environment warrants a more thorough consideration by all stakeholders and likely legislative (not administrative) action.

IV. Conclusion

API recognizes that OAG wishes to clarify the application of Section 3 of the Unfair Trade Practices and Consumer Protection Law. However, the Proposed Rules in their current form would enact an unnecessary and potentially harmful expansion of the types of practices prohibited by it. This could result in over-enforcement by government regulators and over-deterrence of efficient conduct that benefits consumers and the Pennsylvania economy. The potential harm would be magnified by the right of private action applicable to the new substantive prohibitions.

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[3] California is well-known for its business unfriendly provisions that spur litigation such as Proposition 65 and California Civil Code Provision 17200, which can be used to challenge a wide range of business practices. The Proposed Rules would move Pennsylvania significantly toward that litigation-friendly, anti-business environment.

Finally, OAG's authority to adopt such sweeping changes via rulemaking is open to serious question. Although Section 3.1 of the Unfair Trade Practices and Consumer Law delegates to the Attorney General the authority to adopt rules and regulations as may be necessary for the enforcement and administration of the Act, it is far from clear that the Proposed Rules (which enact significant new substantive prohibitions beyond the scope of existing federal antitrust law) fall within this authority.