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MARCELLUS SHALE COALITION℠

September 30, 2019

Office of the Attorney General
Antitrust Section
Strawberry Square, 14th Floor
Harrisburg, PA 17120
Via email: antitrust@attorneygeneral.gov

Re: Proposed Rulemaking, Unfair Market Trade Practices, 49 Pa. Bul. 4993, August 31, 2019

Dear Sir or Madame:

The Marcellus Shale Coalition ("MSC") was formed in 2008 and is comprised of approximately 150 producing, midstream, transmission and supply chain members who are committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in the nation in natural gas production, gathering, processing and transmission, as well as the suppliers and contractors who service the industry.

The MSC appreciates the opportunity to comment on the above-referenced proposed regulations. The MSC recognizes that the business community could benefit from regulations that clarify the scope of the definitions of "unfair methods of competition" and "unfair or deceptive acts or practices" as those terms are used in the Unfair Trade Practices and Consumer Protection Law ("Act") 73 P.S. §201-1 *et seq*. However, the MSC respectfully suggests that the regulations proposed by the Office of Attorney General ("OAG") exceed its statutory authority and impermissibly enlarge and amend the Act. By essentially writing an antitrust statute by regulation, OAG is encroaching upon the authority of the General Assembly.

The General Assembly has delegated rulemaking authority to OAG authorizing OAG to adopt regulations "necessary for the enforcement and administration of this act." 73 P.S. §201-3.1. Logically, this delegation of authority must be read as authorizing rulemaking to carry out the purpose and scope of the Act and not the power to replace, amend or enlarge the Act. The Act contains a list of specific activities that the General Assembly determined fell within the definition of unfair methods of competition and unfair or deceptive acts or practices (73 P.S. 201-2(4)) and provides a catch-all provision barring other fraudulent or deceptive conduct that creates confusion or misunderstanding. 73 P.S. §201-2(4)(xxi). The rulemaking authority delegated to OAG should be read in this context. The General Assembly obviously intended that the Attorney General could add to the list of specific activities that are likely to cause confusion or misunderstanding among consumers. The General Assembly did not empower the Attorney

General to enlarge the scope of the Act to include antitrust provisions regulating the conduct of business in matters wholly unrelated to deceiving or confusing consumers.

If the Legislature's grant of rulemaking authority could be read so broadly as to allow the scope of the Act to be expanded, it would likely constitute an unconstitutional delegation of authority lacking sufficient standards or guidance See, *Eagle Environmental. II, L.P. v. Commonwealth*, 884 A.2d 867, 880 (Pa. 2005) ("legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions."). Accordingly, one cannot assume that the General Assembly intended to empower the Attorney General to enlarge the Act beyond its original purpose. The delegation of authority must be clear and unmistakable. *Eagle Environmental*, 884 A.2d at 878. Creating a new category of regulated conduct, "Unfair Market Trade Practices," which is essentially an antitrust statute, does in fact enlarge the scope of the Act. Any legislative grant of authority to enforce antitrust provisions through the Act must be conferred in express terms. An agency cannot confer that authority upon itself by regulation. See, *Marcellus Shale Coalition v. Dept. of Environmental Protection*, 193 A.3d 447, 463 (Pa.Cmwlth. 2018). There is no clear indication that the General Assembly intended the Attorney General to have that authority.

The preamble to the proposed rulemaking correctly notes that the Commonwealth Court in *Anadarko Petroleum Corporation v. Commonwealth*, 206 A.3d 51 (Pa. Cmwlth. 2019), recognized that the Attorney General had authority to further define unfair methods of competition or unfair or deceptive acts or practices. However, the Court also noted that the Act is not designed to "render *all* anti-trust violations actionable and that the scope of actionable antitrust behavior under the UTPCPL is narrower than under antitrust law." *Anadarko*, 206 A.3d 51, 60 (emphasis in original). The proposed regulations ignore this limitation and propose a sweeping incorporation of antitrust concepts into the definition of unfair methods of competition. The scope of the regulation goes far beyond that which is "necessary to enforce and administer" the Act as enacted by the legislature.

OAG's analysis relies heavily on an analogy to the Federal Trade Commission Act, 15 U.S.C. § 41. Notably that act does not define anti-competitive conduct nor does it provide for enforcement of antitrust law. While the referenced case law indicates that a violation of antitrust laws enacted by Congress can be a deceptive practice, the case law does not suggest that the Federal Trade Commission, as opposed to Congress, can define what constitutes anti-competitive conduct. However, that is exactly what OAG has proposed with these regulations. The proposed regulations do not merely indicate that violations of antitrust provisions in other laws enacted by the General Assembly will be construed as unfair or deceptive trade practices. Rather, the proposed regulations would enact new antitrust provisions. This unlawfully supplants the role of the Legislature.

Putting aside the question of the Attorney General's authority to create a new category of regulated conduct, the regulations are overly broad and vague and create ambiguity rather than clarity. The proposed regulation adds a definition of "Unfair conduct," a term not used in the Act. The proposed definition is so broad and unrestricted as to be arbitrary and capricious, if not a denial of due process. The definition allows the Attorney General to determine what "unfair conduct" is, "within at least the penumbra of any common law, statutory, or other established

concept of unfairness" on an *ad hoc* and retroactive basis and pursue enforcement based on that *ad hoc* determination. The definition fails to meaningfully define the prohibited conduct. This provision should be stricken.

As noted above, the term "unfair market trade practices" is a new term that is not addressed in the Act, and OAG has no authority to add a new category of prohibited conduct. Furthermore, the scope of the definition is so broad as to potentially bar legitimate business dealings or fail to reasonably advise companies what conduct is prohibited. There are many legitimate reasons for businesses to enter into contracts or arrangements that are or are similar to joint ventures. In the oil and gas industry, for example, it is common to have joint operating agreements or joint venture agreements whereby one company may operate and manage the production of gas from acreage leased by one or more other companies. Under the agreement, all of the companies share in the costs and the revenue proportionately. Market conditions may dictate that the price of natural gas is so low that curtailing production to await a better price may be fiscally prudent[1]. Subpart (iii) of the definition would seem to bar that joint decision since it would, arguably, "reduce output." Certainly, a business may legitimately decide not to sell a product if it cannot recover an adequate return. Simply because that endeavor involves two or more parties sharing in costs and revenues should not lead to an allegation of antitrust violation.

Likewise, subpart (iv) would seem to bar two companies from having a joint promotion of their products such as buying product X and getting a 50% discount on product Y. Subpart (viii) is so vague that it fails to adequately advise persons what activity is prohibited. For example, what is "competitively unreasonable" and what is a "dangerous probability"? These terms are undefined, apparently also to be determined by the OAG on an *ad hoc* basis. Does merely trying to increase one's market share through promotions, discounts, and rebates violate this provision? Will the answer depend on the subjective judgment of OAG? These provisions should be eliminated or substantially revised.

The proposed regulations unnecessarily and improperly incorporate language from the Act and in some cases make amendments to the statutory language. In essence, OAG is abrogating the statute and replacing it with its regulations. As detailed below, repeating statutory language and replacing it with references to the regulations themselves is unnecessary and inappropriate.

Section 311.3. The statute defines an unlawful act or practice. No need exists for this definition to be repeated in the regulations.

Section 311.4. The Attorney General cannot grant itself the right to seek an injunction. This authority is contained in the Act, and no need exists to repeat the grant of authority or suggest that it derives from the Attorney General's rulemaking authority. Furthermore, no authority exists to add the last sentence in Section 311.4, in essence amending the statutory language and attempting to eliminate the discretion of the courts.

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[1] It should be noted that a royalty owner entitled to royalty payments on natural gas may also prefer that production of its resources await market conditions that yield a better price.

Sections 311.5 through 311.8. These sections are all essentially copied from the Act, but the references are changed to the provisions of the proposed regulations rather than the Act, thus eliminating the applicability of the Act to the Attorney General's enforcement power. These provisions are unnecessary and should be eliminated.

Section 311.9. The Attorney General has no authority to create a private right of action, a power that is a reserved in the General Assembly through statutory enactment. Therefore, there is neither legal basis for this section nor any need to repeat the statutory provision. In addition, the Attorney General cannot through rulemaking alter the statutory language by adding subparagraphs (c) and (d) to Section 311.9. No statutory authority allows the Attorney General to dictate and approve settlements of cases brought pursuant to a private cause of action created by the legislature. Likewise, no statutory authority exists for the Attorney General to attempt to immunize itself from questions of standing. As noted in the proposed regulations, 71 P.S. §732-103 already deals with that issue, and the Attorney General cannot expand upon that statute.

Section 311.10. OAG cannot grant itself subpoena power. If the Attorney General believes that other statutes grant it subpoena power, then that is sufficient and need not be repeated or enhanced in the proposed regulations. Moreover, the power of the Bureau of Consumer Protection to demand documents and papers and records applies only in matters relating to consumer protection.

Sections 311.11 and 311.12. These provisions encroach upon the authority of the legislature. The Attorney General has no authority to dictate how statutes should be construed. The legislature or the courts are the proper bodies to establish rules of interpretation. Likewise, the Attorney General has no authority to create a new violation that is not provided for in the Act.

The promulgation of the proposed regulations in their current form would be contrary to the public interest. The vagueness of some provisions and the ability of OAG to make *ad hoc* determinations of what constitute prohibited activities will lead to uncertainty, confusion, and unnecessary litigation. For all of the foregoing reasons, it is respectfully suggested that OAG should withdraw the rulemaking and resubmit a substantially revised rulemaking that adheres to the limited powers granted to it by the General Assembly.

Very truly yours,

David J. Spigelmyer
President

cc: Mr. David Summer, Independent Regulatory Review Commission

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