Comments of the Independent Regulatory Review Commission

Office of Attorney General Regulation #59-10 (IRRC #3242)

Unfair Market Trade Practices

October 30, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the August 31, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Office of Attorney General (OAG) to respond to all comments received from us or any other source.

1. **Determination of whether the regulation is in the public interest; Statutory authority; Legislative intent; Clarity, feasibility and reasonableness of the regulation; Implementation procedures; Possible conflict with statutes; and Need.**

Regulatory Analysis Form and Preamble.

Section 5.2 of the Regulatory Review Act (RRA) directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. In making this determination, IRRC must first consider whether an agency has the statutory authority to promulgate a regulation and whether it conforms to the intent of the General Assembly. 71 P.S. § 745.5b(a). IRRC must also consider criteria such as the clarity, feasibility and reasonableness of the regulation, and analyze the text of the Preamble and the proposed regulation and the reasons for the new language. 71 P.S. § 745.5b(b). IRRC also reviews the information a promulgating agency is required to provide in the Regulatory Analysis Form (RAF) pursuant to Section 5(a) of the RRA. 71 P.S. § 745.5(a)).

The RAF and Preamble state that the purpose of this regulation is to clarify terms under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) and to define certain anticompetitive conduct as unfair methods of competition and unfair or deceptive acts or practices. Specifically in the Preamble, the OAG explains its "policy position" that unfair market trade practices constitute unfair methods of competition and unfair or deceptive acts or practices in violation of the act in line with federal jurisprudence interpreting Section 5 of the Federal Trade Commission Act (FTCA). The Preamble further explains that the legislature did not act to pass antitrust legislation because it believes it to be redundant with the existing consumer protection law. Also, Commonwealth Court's decision in *Andarko Petroleum Corp. v. Commonwealth,* 206 A.3d 51 (Pa. Cmwlth. 2019) gives the OAG the authority to promulgate definitions and deem certain anticompetitive conduct as "unfair methods of competition" or

unfair or deceptive acts or practices under the Act through the administrative rulemaking process. Additionally, the Preamble states that because residents do not have a clear understanding of their legal remedies for injury resulting from anticompetitive conduct, this proposed rulemaking "will remedy this unfair vacuum under Commonwealth law."

The OAG has the statutory authority to promulgate regulations as may be necessary to enforce and administer the UTPCPL. 73 P.S. § 201-3.1. That regulatory authority does not extend to the FTCA. We understand the OAG's explanation and analysis of the *Andarko* case. However, it remains unclear where the authority exists to not only define and clarify existing terms used in the statute and regulation, but to add new legal prohibitions (including antitrust violations) to those terms where the statutory language is clear. For example, the statutory definition of "unfair methods of competition" and "unfair or deceptive acts or practices" defines these terms with twenty-one specified categories of unlawful conduct. 73 P.S. § 201-2. Section 311.2.24 of the proposed regulation repeats this list and adds three new categories. Within each of those three categories is a list of new categories of prohibited conduct that are not found within the statute. Similar issues are raised in the comments below.

We have found no indication that there was an intent by the legislature for the UTPCPL to be expanded by regulation by adding new categories of antitrust activities. The proposed rulemaking copies much of the statutory text and supplements it with new prohibitions, effectively amending the law.

While the courts have given administrative agencies some deference in interpreting their respective enabling statutes, they may not promulgate regulations that are inconsistent with the law or without the appropriate delegated authority by the General Assembly. *See Keith v. Commonwealth*, 151 A.3d 687, 695 (Pa. Cmwlth. 2016), *citing Borough of Pottstown v. Pennsylvania Municipal Retirement Bd.*, 712 A.2d 741, 743 (Pa. 1988) (such regulations are "valid . . . to the extent that they merely construe a statute and do not improperly expand upon its terms").

In the final-form rulemaking package, we ask the OAG to further explain why this regulation is consistent with its statutory authority and the intent of the General Assembly.

Possible conflict with or duplication of statutes or existing regulations.

Commentators identified the following federal and state statutes, regulations and policies that they believe the proposal either conflicts with or duplicates.

- *UTPCPL:* The OAG states that the purpose of the rulemaking is to define and clarify certain terms under the UTPCPL in line with state and federal case law. While the proposal incorporates most of the consumer protections provisions of the UTPCPL (excluding the dog purchase provisions in Section 201-9.3) it does not carry over Sections 201-7 (relating to Contract: effect of rescission) and 201-9.1(relating to Powers of receiver). It is clear some statutory language was carried over to the proposed regulation for clarification purposes. However, why is all of the statutory language copied with the exception of those provisions?

The OAG should also refer to Section 2.14(a) of the *Pennsylvania Code and Bulletin Style Manual.*

- *Unfair Insurances Practice Act*: Commentators assert the proposed rulemaking is duplicative and may also be inconsistent with the Unfair Insurance Practices Act, 40 P.S. §§ 1171.1, *et seq.*, which acts as an insurance specific version of the UTPCPL. They seek clarification from the OAG as to whether the proposal is to be implemented concurrently with Unfair Insurances Practice Act and in coordination with the Pennsylvania Insurance Department.

- *Department of Banking and Securities Code:* Similar industry-specific concerns are raised by the association representing bankers. It states that the proposed regulation is based on the premise that the scope of the OAG's authority under the UTPCPL is co-extensive with the power granted to the Federal Trade Commission (FTC). However, under Section 5 of the FTCA, the FTC does not have the authority to regulate unfair methods of competition and unfair or deceptive acts or practices of banks, savings associations and credit unions. 15 USCA § 45(a)(2).

- *Sherman Act:* See comments under the definition of *"Unfair market trade practices."*

- *Clayton Act:* The Hospital and Healthsystem Association of PA (HAP) submits that the federal Clayton Act currently allows the OAG to bring an action to block a merger of two hospitals on the ground that the merger is anticompetitive. But, because there is no state antitrust statute, the OAG has been limited in the antitrust enforcement actions it could bring against hospitals. With the proposed regulation, the OAG and private parties would be able to challenge activities that have been subject to enforcement by the federal antitrust enforcement authorities. HAP believes that the proposed rulemaking increases the risk that hospitals will face a state enforcement action that would not meet the threshold of potential harm for a federal enforcement action.

- *Class Action Fairness Act:* See comments on Section 311.9(c).

- *OAG "Tying Arrangement Enforcement Policy:"* The PA Manufactured Homes Association (PMHA) is concerned that the proposed regulations, specifically the definition of "unfair market trade practices" could be interpreted to include the tying arrangements that the OAG approved in 1993 and included in its Tying Arrangement Enforcement Policy. If this were to occur, community owners and retailers/seller could be at risk of liability for conducting themselves in a manner that OAG has previously approved. According to PMHA, nothing has changed since 1993 that would indicate that the Tying Arrangement Enforcement Policy is no longer relevant or necessary.

- *Commonwealth Attorneys Act:* The PA Bankers Association acknowledges that the OAG has the power to initiate actions to enforce federal antitrust laws under 15 U.S.C.A § 15c and under section 204(c) of the Commonwealth Attorneys Act (CAA). Because there is no

antitrust law in Pennsylvania, the power of the OAG to enforce antitrust violations is currently limited to the authority granted to states to enforce federal antitrust law provided by 15 U.S.C.A § 15c and the CAA. The OAG cannot expand its powers to enforce antitrust laws beyond what the legislature granted in section 204(c) of the CAA by regulation.

In the final-form rulemaking package, the OAG should explain why this regulation is consistent with existing laws. Recognizing that a regulation has the full force and effect of law and that it establishes binding norms on the regulated entity and the agency that promulgates it, the OAG should provide a detailed explanation of how it plans to implement the rulemaking and simultaneously implement the tying arrangement policy with the manufactured homes industry which may conflict with the regulation.

Need

As noted above, the OAG has the authority to enforce the consumer protection laws under the UTPCPL, as well as federal antitrust violations pursuant to Section 202(c) of the CAA. Most of the provisions of the UTPCPL are repeated in the proposed regulation. In the final-form regulation, we ask the OAG to explain the need to include provisions that are already covered by existing laws.

Reaching of consensus.

We received comments from organizations representing varied interests and input from an antitrust law expert. Only one commentator expressed support for the proposal, but still offered substantive changes to the rulemaking. In broad terms, commentators questioned the statutory authority of the OAG to implement an antitrust law via the regulatory review process. Many expressed concern that the proposed rulemaking is also contrary to the legislative intent of the UTPCPL. Namely, they believe that the legislature did not intend for the UTPCPL to be an antitrust law, but rather a fraud prevention statute to protect consumers and purchasers of home goods and services by placing them on more equal footing with sellers in consumer transactions. Commentators offered numerous examples of where they believe the proposal conflicts with or is duplicative of existing federal and state laws. One commentator asks how the provisions will affect a longstanding written agreement that its industry has had with the OAG.

Section 2 of the RRA explains why the General Assembly felt it was necessary to establish a regulatory review process. Given the interest this proposal has generated, we believe it is appropriate to highlight the following provision: "To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency." 71 P.S § 745.2.

Additionally, the UTPCPL provides that the Attorney General may adopt regulations as may be necessary for the enforcement and administration of the Act after a public hearing. 73 P.S. § 201-3.1. In RAF #14 and #29, it states that the OAG conducted a public hearing on September 11, 2018. Was the public hearing conducted for this proposed rulemaking or for a

prior version of the rulemaking? If the hearing was for a prior version of the proposal, we strongly encourage the OAG to seek input from the regulated community prior to submitting a final-form regulation. Not only would such a hearing for this rulemaking be consistent with the requirements of the UTPCPL but it would also aid in building a consensus with members of the regulated community as set forth in the RRA.

In order to resolve many of the objections raised by the commentators, we strongly encourage the OAG to hold a public hearing or meet with the regulated community. We also suggest that the OAG issue an Advanced Notice of Final Rulemaking. This would allow interested parties and the OAG the opportunity to resolve as many concerns as possible prior to the submittal of the final-form regulation.

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

The proposed regulation significantly expands the UTPCPL by including antitrust provisions that are currently actionable under federal law. It expands the range of transactions to all economic transactions and not just limited to unfair or fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding. It also creates new private actions, gives the OAG the power to veto all UTPCPL class action settlements and to issue subpoenas. On page 2 of the Preamble, the OAG explains that this regulation "will remedy this unfair vacuum under Commonwealth law."

Several commentators have observed that despite numerous attempts over the years, the General Assembly has not enacted state antitrust legislation. The long history of legislative efforts to adopt antitrust provisions in the form of a separate, freestanding statute demonstrates that the UTPCPL was not intended by the General Assembly to be an antitrust law. A recent attempt was Senate Bill 858, introduced in 2017. In the accompanying memorandum to the bill, Senator Stewart Greenleaf explained the need for a comprehensive antitrust law because the OAG (1) does not have the ability to subpoena documents; (2) may lose control over litigation by bringing action in federal, rather than State, court; and (3) may not be able to recover damages from activities such as price fixing. Among other things, the intent of Senate Bill 858 was "to make illegal any contract conspiracy or combination in restraint of trade and any monopolization in restraint of trade." We therefore question whether this purported vacuum in state law is a matter for the legislature to address. We also question whether the extension of the OAG's enforcement power is a matter for which the OAG should seek legislative approval.

3. Economic or fiscal impact; and Implementation.

The OAG states that there are no anticipated costs and/or savings to the regulated community or to the Commonwealth associated with the implementation of this rulemaking. (RAF #19, #21) Commentators disagree with the OAG's assessment of the fiscal impact.

The proposal's definition of "unfair conduct," according to commentators, is overly broad and does not provide a clear standard as to what conduct is actually being prohibited. As a result, enforcing the definition of "unfair conduct" has the potential to vastly expand the number of lawsuits asserting UTPCPL claims. Whether the claims have merit or not, they believe they will be costlier and riskier to defend and likewise to settle.

Others contend that some of the proposal's requirements are duplicative of rules and laws that already exist for their particular industries. This redundancy, they claim, would likely increase costs since they would need to ensure compliance with the UTPCPL as well as industry-specific statutes.

Two commentators observe that Section 311.9 (c) (relating to Private actions) would require the OAG to maintain an "apparatus" or "redeploy valuable resources" to respond to all class action settlements asserting claims under the act as interpreted by the rulemaking. The OAG should explain how Section 311.9 (c) will be implemented. It should also review and revise the Preamble and RAF to reflect any fiscal impacts the rulemaking will have upon the regulated community and the Commonwealth's resources.

4. Section 311.2. Definitions. – Statutory authority; Legislative intent; Clarity and lack of ambiguity; Conflicts with other statutes and regulations.

The following definitions utilize derivatives of the term within the definition: "ascertainable loss," "deceptive conduct," "fraudulent conduct," "marketing communication," "tangible document or recording," and "trade and commerce." Section 2.11(h) of the *PA Code and Bulletin Style Manual* (*Style Manual*) states the term being defined may not be included as part of the definition. The OAG should amend the definition section in the annex to the final-form rulemaking to make certain that derivatives of the term being defined are not included in the definition.

The definitions for the following terms are overly broad or vague: "as a result of," and "articles of trade or commerce," "deceptive conduct," "fraudulent conduct," "representing," "sale" and "unfair conduct." The OAG should clarify these terms in the final rulemaking. We would encourage the OAG to seek input from the regulated community and commentators in crafting new definitions.

"Advertising"

This definition applies only to "advertising" in Section 3112.2 (24). It is presumed that this definition is different than the "advertising" that appears in the definition of "*trade and commerce.*" Section 2.11(e) of the *Style Manual* states that substantive (that is, regulatory) provisions may not be in a definition section. Since the OAG is setting apart this definition from the "advertising" in the definition of "trade and commerce," the OAG should establish a separate section to deal with the differences or special circumstances.

"Deceptive conduct"

This term is defined as "[a] method, act or practice which has a capacity or tendency to deceive." This definition appears to significantly expand the range of actionable conduct under the UTPCPL, which limits deceptive conduct to that "which creates a likelihood of confusion or of misunderstanding" (*see* 73 P.S. § 201-2(4)(xxi)) to conduct "which has a capacity or tendency to deceive."

"Moneys or property, real or personal"

This definition incorporates items that could be recoverable by the OAG in § 311.5, including attorneys' fees, expert fees investigation and litigation costs. Commentators contend that inclusion of these items into the definition is not consistent with the plain meaning of these terms. Moreover, they believe the OAG does not have the authority to expand that which is recoverable under the UTPCPL. The OAG should explain how this amendment is consistent with its statutory authority and the intent of the General Assembly.

"Sale"

A sale includes buying and selling, not buying or selling. As proposed, purchasers and consumer, who are supposed to be protected under the law, could now be subject to liability for violations under the law. The phrase "any other similar activity" is vague. The OAG should revise this definition in the final-form rulemaking to make it clearer. Commentators suggest, and we agree, that the definition should include "leasing."

"Trade and Commerce"

The OAG proposes to expand the statutory definition of "trade and commerce" 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." Commentators state the effect of this amendment, coupled with the proposed definitions of "sale," "transaction," and "article of trade or commerce" broadly expands the UTPCPL from "policing traditional buyer-seller consumer transactions into covering all economic transactions." What is the statutory authority for this amendment? How is it consistent with the legislative intent of the General Assembly?

"Unfair conduct:

This term is defined as:

> 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.

The definition is so broad and ambiguous that it provides very little guidance as to what types of actions would not be considered to be actionable. Some of the confusing phrases

include "without necessarily having been previously considered unlawful," "which violates public policy," "or otherwise within at least the penumbra . . . ."

In the context of the UTPCPL, it appears that unfair conduct, acts or practices is limited to that which creates a likelihood of confusion or of misunderstanding. How is the proposed language consistent with the statute?

"Unfair market trade practices"

Subparagraph (v) prohibits any contract "where the sale of an article or trade or commerce is conditioned upon the seller's purchase of any other article of trade or commerce produced or performed by the buyer." What type of behavior is this provision trying to prevent? It appears to be very broad and could have the effect of restricting all types of promotional activities, such as buy one item and get another for half price.

The terms "actual monopolization" and "actual monopoly power" are used in subparagraphs (vii)-(ix). One commentator states that Section Two of the Sherman Act governing monopolization does not include the term "actual." The proposed rulemaking provides no guidance as to what "actual" adds to the Sherman Act definition and may be construed to be a limitation. The commentator suggests, and we agree, the term "actual" should be deleted or a clarification of its purpose be provided.

Subparagraph (viii) uses phrases "competitively unreasonable practices" and "dangerous probability." These terms are not defined in the regulation. The OAG should define these terms in the annex of the final-form regulation.

"*Unfair methods of competition and unfair or deceptive acts or practices*"

This definition tracks the UTPCPL with the exception of three new categories of conduct or practices that are broadly defined in this regulation: *Unfair market trade practices*; *Unfair conduct*; and *Deceptive conduct*.

Commentators question the statutory authority of the OAG to add these antitrust violations to the list of acts specified in the UTPCPL. Furthermore, it is their view, that each one of the three new definitions is "problematic in its vagueness, subjectivity and potential for abuse." How is the regulated community to know what constitutes the extent of a penumbra of a law? How will they know what an established concept of unfairness is? What is the statutory authority that permits the OAG to expand this definition to include three new categories of conduct or practices?

5. Section 311.3. Unlawful acts or practices; exclusions. – Conflict with statute or regulations and Statutory authority.

This subsection mostly tracks the language of the statute by declaring unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce to be unlawful. However, the statute specifically mentions "as defined by subclauses (i) through (xxi) of clause (4) of section 2 of the act and regulations promulgated under section 3.1 of this

act are declared unlawful." The proposal omits the language that references the 21 acts explicitly included under the definition "unfair methods of competition" and "unfair or deceptive acts or practices."

Also the OAG proposes to add that "any owner, publisher, printer, agent or employee of an Internet service provider" to the list of broadcast and print media that is excluded from the provisions of the chapter. The OAG should explain how these amendments are consistent with the UTCPL and the intent of the General Assembly.

6. Section 311.4. Restraining prohibited acts. – Statutory authority; Need.

This section amends Section 201-4 of the UTPCPL by (1) replacing the statutory list of unlawful conduct with a new list in Section 311.3, and (2) adding that "[t]he payment of rebate by any person to a person in interest does not act as a bar to the imposition of a temporary or permanent injunction or the award of any form of monetary relief under the chapter." What is the statutory authority and need for this added language?

If needed, why is the new language for rebates in this section rather than in a separate section?

7. Section 311.5. Payment of costs and restitution. – Statutory authority and legislative intent.
Section 311.6. Assurances of voluntary compliance.
Section 311.7. Civil penalties.
Section 311.8. Forfeiture of franchise or right to do business; appointment of receiver.

Similar to Section 311.4, these provisions track the statutory language in Sections 201-4.1, 201-5, 201-8, and 201-9, respectively, of the UTPCPL with one modification. They each replace the statutory list of violations with the newly-expanded list of violations in this regulation. What is the statutory authority for this change?

8. Section 311.9. Private actions. – Statutory authority; Possible conflict with statute; Fiscal or economic impact; Conflict with statutes and regulations; and Implementation.

Subsections (a) and (b)

Subsections (a) and (b) track the statutory language in Section 201-9.2 of the UTPCPL but they replace the references to the statutory list of violations to the new violations in the regulation. What is the statutory authority for these changes?

Subsection (c)

Commentators remark that this subsection conflicts with the federal Class Action Fairness Act (CAFA). CAFA requires notice to the OAG of any class action settlement, but instead of consent, provides opportunity for the OAG to object. It also requires that more information be provided to the OAG than is in the proposed rulemaking.

They also observe that this provision would require the OAG "to maintain an apparatus that would be required to respond to all class action settlements asserting claims under the act as interpreted by the Rule." Another commentator expresses similar concern that this provision would require the OAG to "redeploy considerable internal resources" that could be spent on other pressing matters before the Commonwealth. The final-form rulemaking package should clarify the OAG's authority to consent to private class action lawsuits and whether this provision conflicts with federal law.

Subsection (d)

This provision limits a person's right to challenge legal representation except as set forth in the CAA. What is the OAG's authority to limit a statutory right in a legal action by regulation, and is this provision consistent with the statute?

9. Section 311.10. Subpoena power. – Statutory authority; Legislative intent;

What is the OAG's statutory authority to grant itself the power to issue subpoenas? We note that when the UTPCPL was amended by Act 260 of 1976, a similar provision was deleted. We therefore question whether this proposed language was intended by the General Assembly.

10. Section 311.11. Interpretation. – Statutory authority; Legislative intent; Clarity; and Need.

The phrase "unfair or deceptive **business** practices" is used in subsection (a). The term "business practices" is not defined and does not appear elsewhere in the annex. "Business" should be deleted from the phrase or the term "business practices" defined.

Also, this subsection uses the term "will." Should it be "shall?" See Section 6.7 of the *Style Manual.* ("Will" is also used in *Subsection (b).)*

As discussed in the first comment, this proposed rulemaking incorporates the statutory list of acts or practices that are to be considered unlawful under the definition of "unfair methods of competition and unfair or deceptive acts or practices" and expands the list. What is the authority for the OAG to determine how the law will be interpreted and construed and was this intended by the General Assembly? What is the need for this section?

11. Section 311.12. Waiver of rights. – Statutory authority; Legislative intent; and Need.

What is the authority for the OAG to determine by regulation that a waiver of rights under the regulation is a violation of the UTPCPL? What it the intent of the legislature to allow a further expansion of unlawful activities?

12. Miscellaneous clarity.

- Definitions in regulations are not typically numbered when published in the *PA Code and Bulletin.* (See *Style Manual*, § 2.11(g).) However, at a minimum, they should be outlined consistently with the Style Manual. For example, reference to making telephone solicitations without proper identification of the seller as Section 311.2.24(a)(A), as well as the rest of this section, does not adhere to the requirements of the *Style Manual,* § 2.1.

- Inconsistent formatting: Although many of the definitions are copied directly from the statute, they should be consistent in the regulation. Some definitions start with the word "means" and while most do not. Also, the text of some definitions begin with a capital letter and some do not. For example: "*Documentary material*—means the original or a copy of any book, record, report . . ." should read: "*Documentary material*—the original or a copy of any book, record, report . . . ."

- The term "fraudulent conduct' does not appear in the annex. In paragraph (x) of the definition of "*Unfair methods of competition and unfair or deceptive acts or practices,*" the term "fraudulent" is part of the phrase "fraudulent or deceptive conduct." It does not appear as a standalone term.

- RAF #29 sets forth the regulatory review schedule, including a delivery and effective date for the final-form regulation as Fall 2019. Since the statutory deadline for these comments is October 30, 2019 under the RRA (*see* 71 P.S. § 745.5(g)), the OAG should revise this timetable in the RAF for the final-form regulation.