

## Comments of the Independent Regulatory Review Commission



### Office of Attorney General Regulation #59-001 (IRRC #3373)

#### Automotive Industry Trade Practices

July 12, 2023

We submit for your consideration the following comments on the proposed rulemaking published in the May 13, 2023 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (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. Compliance with the provisions of the RRA or the regulations of the Commission in promulgating the regulation.**

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 submitted with this proposal do not provide sufficient information to determine if the rulemaking is in the public interest. When the final-form regulatory package is submitted for consideration, we ask the OAG to provide additional information regarding the need and rationale for, as well as the applicability and fiscal impact of, the rulemaking. Our comments below on specific sections of the rulemaking also raise these concerns, but a more detailed explanation of the rulemaking in the context of the information required by the RAF is required. Specifically, we ask the OAG to provide additional information for the following sections of the RAF:

- RAF #11 – The OAG explains that from their “experience of investigating consumer complaints related to the sale of motor vehicles” stronger regulations are required. We ask the OAG to quantify the number and type of complaints it received from consumers over the last five years and to explain how the provisions included in the rulemaking will help prevent similar problems from occurring.

- RAF #15, #16 and #24 – These sections of the RAF require a promulgating agency to identify the types and numbers of persons, businesses, small businesses (as defined by Section 3 of the RRA) and organizations which will be affected by the regulation. The OAG has provided a general description of the types of business affected, but has not provided the information required by the RRA or IRRC’s regulations. We ask the OAG to provide the required information in the RAF when the final-form regulation is submitted. In addition, if this rulemaking is applicable to businesses engaged in the sale of motor vehicles via an auction, those businesses should be included in the OAG’s response.

We also ask the OAG to explain if this rulemaking applies to out-of-state businesses that sell vehicles through electronic means, such as a website, to Pennsylvania residents. If so, how many of those businesses would be affected by the rulemaking?

- RAF #19 and #23 – These sections of the RAF relate to the fiscal impact the rulemaking will have on the regulated community. The information provided by the OAG indicates that the rulemaking will not have a fiscal impact. We ask the OAG to revise this answer to include the cost associated with inspecting vehicles by auto dealers selling the vehicles and also businesses that auction vehicles, if applicable.
- RAF #29 – The dates for the schedule of review of this regulation should be updated when this rulemaking is submitted in final-form.

**2. Section 301.1. Definitions. – Statutory authority; Clarity; Implementation procedures.**

The definition of “advertisement” is being amended to include the phrase, “placed on a web site, in a mobile application, on a social media outlet or on any other electronic platform.” The OAG explains in RAF #10 that the language is needed to “make explicit that advertisements for motor vehicles and motor vehicle goods and services must comply with Auto Regulations across all media.” We have three questions about the new language. If an auto dealer lists all of its automobile inventory on its website, would that action be considered an advertisement, and therefore subject the auto dealer to all of the requirements of Chapter 301? Is there a difference between a customer that finds an inventory list on a website via their own research compared to a customer that is persuaded to view a website through an advertisement? Finally, what obligations, if any, do out-of-state businesses have if they advertise in the Commonwealth, and what authority would the OAG have to enforce compliance by those businesses? In the Preamble to the final-form regulation, we ask the OAG to respond to these questions and to explain how it will implement and administer this revised definition in conjunction with the entirety of Chapter 301.

**3. Section 301.2. Advertising and sales presentations. – Statutory authority; Implementation procedures; Fiscal impact; Need; Reasonableness; Clarity.**

*Subsection (5)*

This subsection specifies what existing conditions must be disclosed by an advertiser or seller of a motor vehicle. The existing regulation includes six conditions and this rulemaking adds, “Any other material condition which substantially impairs vehicle use or safety.” A commentator believes this requirement is vague and asks the OAG to explain what other conditions not covered by the existing six conditions would be required to be disclosed. We agree that the proposed language is vague and ask the OAG to clarify this provision in the final-form rulemaking. In addition, we ask the OAG to explain the need for this new requirement and provide examples of the types of problems they have encountered in the administration of Chapter 301.

*Subsection (5.1)*

The following language is being added to Section 301.2:

Except as to a sale of a motor vehicle to another motor vehicle dealer, the advertisement or offering of a motor vehicle for sale unless a certified inspection mechanic designated by the selling motor vehicle dealer has inspected the motor vehicle in accordance with 67 Pa. Code Chapter 175 (relating to vehicle equipment and inspection):

- (i) Not more than 30 days after the motor vehicle comes into the inventory of the selling motor vehicle dealer or advertiser; and
- (ii) Not more than 30 days after each time the motor vehicle accumulates 500 miles while in the inventory of the selling motor vehicle dealer or advertiser.

This provision has generated significant interest from the regulated community, particularly businesses that sell motor vehicles via auction. We believe many of the concerns may relate to a misunderstanding of the applicability of this language. The motor vehicle auction industry which sells salvaged and non-repairable vehicles that are advertised as such, and vehicles sold to other auto dealers for resale, believe this language would require them to provide the disclosures of Subsection (5) and perform the inspections required by this new subsection. Examples of problems that could arise from this interpretation include: the practicality of assessing and possibly repairing vehicles that are not owned by the auction business; certain auction businesses which sell thousands of cars per year do not have the staff to conduct that many vehicle inspections; the cost associated with the inspection requirement would be significant; written disclosures for salvage vehicles are not needed; and many buyers are motor vehicle dealers that understand the auto auction industry, and disclosures and inspections are not necessary for these types of transactions.

It is our understanding that this result is not the intent of the new language. When this rulemaking is returned in final-form, the OAG should provide a detailed explanation in the RAF and Preamble of how this new language will be applied to this industry. In addition, the language of Subsection (5.1) should be amended to clarify the intent of the OAG. We ask the

OAG to consider language offered by the commentators that would provide exemptions for auto auctions that sell salvage vehicles and vehicles that are intended for resale. Alternatively, the OAG could include language in the final-form regulation that exempts certain types of transactions.

In addition, we ask the OAG to explain how this rulemaking will apply to auctions involving the sale of federal and state government-owned vehicles, vehicles sold by estate auctioneers that sell multiple vehicles per year, vehicles sold at auction to customers for their own use, and out-of-state auto auction businesses that sell to Pennsylvania residents.

#### *Public input hearing and Advance Notice of Final Rulemaking (ANFR)*

It may be beneficial for the OAG to conduct a second hearing on this matter before it submits the final-form regulation. The OAG has cited Section 3.1 of the Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-3) as its statutory authority for this rulemaking. That section states, in part, “The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of this act.” As explained in RAF # 14, a public hearing was held on September 11, 2018 to solicit input on revisions to Chapter 301. We note that the resolution of objections and the building of consensus among interested parties is a primary goal of the RRA. Since this current proposed rulemaking includes provisions that were not included in the version that was discussed at the 2018 public hearing, and because this proposal, and the new provisions, have generated interest from the regulated community, a second hearing may help build the consensus between the OAG and the regulated community that is envisioned by the RRA.

If a second hearing is not conducted, as the OAG develops the final-form rulemaking, we suggest that they work closely with the regulated community to gain a better understanding of how their businesses operate and how the language of Subsection (5.1) applies to them and the impact it would have on them. We believe it would be beneficial for the OAG to issue an ANFR to solicit additional input on this rulemaking, including changes that could be included in the final-form rulemaking.

#### *Inspection requirements*

We also question how the inspection requirements will be administered and enforced. It is our understanding that even though the inspection must be conducted by a certified inspection mechanic in accordance with Pennsylvania Department of Transportation (Department) regulation at 67 Pa. Code Chapter 175, the inspection mandated by this proposed regulation is not an official vehicle inspection required by the Department. However, since this subsection broadly covers Chapter 175, it can be reasonably interpreted to be an official inspection. If the inspection concludes that the vehicle is in compliance with Chapter 175, what sort of documentation would be provided to the owner of the vehicle and/or eventual buyer of the vehicle? If there are deficiencies discovered during the inspection, what action must be taken and what sort of documentation must be provided to the owner or buyer of the vehicle? Would an accompanying emissions inspection required by the Department’s 67 PA Code Chapter 177 regulations also be required at this time?

Finally, we question the need and rationale for requiring in-stock vehicles to be inspected after they have been driven 500 miles. We ask the OAG to explain why annual vehicle inspections required by the Department under Chapter 175 are not sufficient.

#### **4. Miscellaneous Clarity.**

The title Part V of Title 37 is being amended from “Bureau of Consumer Protection” to “Unfair Trade Practices.” Commentators have questioned the rationale for this change and are concerned that it could expose out-of-state auto dealers to enforcement actions and private lawsuits for acts or omissions that occur outside of the Commonwealth. We ask the OAG to retain the existing title of Part V or explain the rationale for the proposed change.