NFIB

3242

September 30, 2019

Tracy W. Wertz
Chief Deputy Attorney General
Antitrust Section
Office of Attorney General
Strawberry Square, 14th Floor
Harrisburg, PA 17120

Re: Proposal to amend 37 Pa. Code by adding Chapter 311 (relating to unfair market trade practices)

Dear Ms. Wertz:

On behalf of the members of the National Federation of Independent Business (NFIB) in Pennsylvania, I am writing to voice our concerns over the Pennsylvania Attorney General's proposed rulemaking #59-10, interpreting the Unfair Trade Practices and Consumer Protection Law (73 P.S. §201-1, *et seq.*) (hereinafter the "Act").

NFIB is an incorporated nonprofit association of approximately 300,000 members across America and 12,500 in Pennsylvania. NFIB protects the interests of small businesses throughout America by ensuring that their voices are heard in the governments of the United States and the fifty States as they formulate public policy. NFIB has a strong interest in voicing the concerns of small businesses in Pennsylvania. We write here to share our concerns that the proposed amendments will impermissibly expand the scope of the Act and impose liability on businesses acting in good faith whenever a consumer dispute may arise.

We generally agree with the assessments of other commenters that Sections 311.2, 311.5, 311.9, 311.10, and 311.11 of the proposed rule exceed the authority granted to the Attorney General by the Act, or by any other statute.[1] Disguised as an exercise of the Attorney General's enforcement and administrative functions under the Act, the proposed rule does not merely interpret the Pennsylvania Legislature's will. Instead, the proposed rule usurps the core power of the Legislature – the power to make laws – and impermissibly expands the scope of the Act beyond the intention of the Legislature. One need merely compare the Act with the proposed rule to notice the problem. The proposed rule mimics the Act verbatim, except where the Attorney General has *added* to the law. The average Pennsylvania citizen probably expects amendments to come from the Legislature, not from the Office of the Attorney General.

[1] *See, e.g.*, comment letters of the Insurance Federation of Pennsylvania, the Marcellus Shale Coalition, the Pennsylvania Bankers Association, and the Pennsylvania Coalition for Civil Justice Reform.

Frederick W. Anton III Center, 225 State Street, Suite B, Harrisburg, PA 17101
717-232-8582 717-232-4098 FAX NFIB.com

Furthermore, the Legislature is the proper place for debate about the changes that the proposed rule would make. The process employed here by the Attorney General is dangerously deficient. While the Pennsylvania Regulatory Review Act provides for some oversight of the administrative rulemaking process, including a 30-day public notice and comment period (through which this letter is submitted), that is no substitute for the rigors of the Legislative process. Where the Legislature is composed of many elected officials who represent the varied interests of different cross-sections of the populace, the Attorney General is a sole individual elected on the expectation that they will *enforce* the law, not make the law.

The proposed rule illustrates the flaw in the process. While purporting to clarify the law, the proposed rule would only muddy the waters. It imposes vague and nebulous new restrictions on businesses. Take, for example, some of the new definitions in Section 311.2. The proposed rule defines "deceptive conduct" as "[a] method, act or practice which has the capacity or tendency to deceive." Similarly, "fraudulent conduct" is defined as "unfair conduct or any other conduct which has a tendency or capacity to defraud." Both definitions are circular and provide no analytical framework to help an individual determine what conduct falls into the deceptive or fraudulent buckets.

Most concerning to our membership is the extreme expansion in potential liability under the new definition of "unfair conduct." The proposed rule adds three prongs to the definition, and each one is problematic in its vagueness, subjectivity, and potential for abuse. The first prong, any act that "without necessarily having been previously considered unlawful" nevertheless "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" is excessively broad. What constitutes the extent of a penumbra of a law? How do we know what an established concept of unfairness is? This provision is so open-ended that it allows the Attorney General to make ad hoc determinations based on a subjective belief of "unfairness" rather than a reasonable, objective standard.

The second and third prongs, which define unfair conduct as any act that is "unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim," are likewise troubling. These terms again provide no objective, analytical inquiry for determining what constitutes "unfair conduct" other than the Attorney General's own subjective beliefs. The third prong's "substantial injury" condition is so poorly worded that it could be broadly construed to impose what is essentially strict liability for any act that causes someone harm. Yet that is contrary to well-worn principles of tort and contract law.

As an example, an NFIB member in Pennsylvania recently became embroiled in a contract dispute with a consumer. The NFIB member owned a painting company, and the company entered into a contract with a homeowner to paint the house. Midway through the painting job, the homeowner became dissatisfied and told the company not to continue. The homeowner hired another contractor to finish painting the house, refusing to pay the original company for the work performed. Ordinarily, this would be a simple contract dispute to be

settled by the normal principles of contract law. But under the proposed rule, the consumer may have a valid claim against the company because the consumer may allege that he or she suffered a "substantial injury" – the subjectively inadequate paint job that required another coat of paint. But of course, a core function of contract law has always been to sort out these commonplace disputes.

Moreover, it has a potentially chilling effect on small business owners, many of whom are already unable to shoulder the burden of even minor litigation costs. In the above example, the small business owner acting in good faith could be discouraged from bringing a valid contract claim against the homeowner because of the potential threat of a countersuit under the Act. While the penalties provided under the Act seem minor at first glance, a plaintiff suing under a private right of action may be awarded attorney's fees, a result that would bankrupt many small businesses throughout the Commonwealth.[2] The proposed rule would impose even greater costs on businesses by broadening their liability under Section 311.5 to allow courts to award attorney's fees in suits brought by the Attorney General. Again, a decision to award attorney's fees rests properly with the Legislature, not the Attorney General.

Finally, the addition of "unfair market trade practices" to the definition of "unfair methods of competition and unfair or deceptive acts or practices" is tantamount to an administratively created antitrust statute. The Office of the Attorney General does not have the power to create such a law, or any law. Rather than belaboring a point already made by others,[3] we wish to emphasize that many of the subparts of the definition implicate standard, legitimate business practices. For example, subpart (iv) would prevent "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." Yet stores routinely use coupons or events allowing reduced price sales conditioned on the purchase of another qualifying item. Surely the Legislature did not intend to prohibit that kind of ordinary business conduct.

For the foregoing reasons, we urge the Attorney General to reconsider the proposed rule and make changes that conform with the stated goal of clarifying the existing law.

Sincerely,

Gordon R. Denlinger
State Director

---

[2] While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year.

[3] *See, e.g.*, comment letters of the Insurance Federation of Pennsylvania, the Marcellus Shale Coalition, the Pennsylvania Bankers Association, and the Pennsylvania Coalition for Civil Justice Reform.