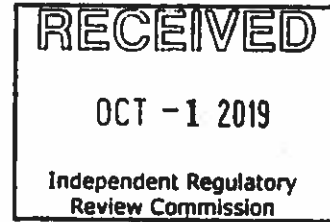




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September 30, 2019

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

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

Dear Office of Attorney General:

The Pennsylvania Bankers Association (PA Bankers) is a voluntary, nonprofit membership organization made up of more than 120 federally chartered and state-chartered banks, savings associations, and their affiliates that do business in Pennsylvania. The Association supports the diverse needs of its membership through volunteer participation, industry advocacy, education, and membership services. It also serves as an advocate in matters of federal, state, and local public policy on behalf of its members.

PA Bankers appreciates the opportunity to comment on the Office of Attorney General's (the Office's) proposal described "...as designed to improve, enhance and update the OAG's unfair methods of competition and unfair or deceptive acts or practices regulations."

The banking industry strongly supports fair competition and fair delivery of goods and services. We cannot, however, support the addition of Chapter 311 for the reasons stated below.

The proposed regulation interprets the UTPCPL's catch-all clause within the definition of the term "unfair methods of competition and unfair or deceptive acts or practices" to include (1) unfair market trade practices; (2) unfair conduct; and (3) deceptive conduct.

Each of these terms is inconsistent with the statute and their insertion via regulation is not in the interest of good public policy.

Unfair Market Trade Practices

The regulation defines "unfair market trade practices" to mean various types of contracts, combinations or conspiracies in restraint of trade. The catch-all clause, however, applies only to "engaging in other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." Contrary to what is authorized by the catch-all clause, contracts, combinations or conspiracies in restraint of trade are not activities which involve fraud or an intent to deceive and

are not characterized by a likelihood to create confusion of misunderstanding. Instead, they result in accumulations of market power that typically increase prices for goods and services and result in lower levels of production than occur in competitive markets. Accordingly, the proposed rule is inconsistent with the authority granted to the Attorney General to identify other types of unfair methods of competition and unfair or deceptive acts or practices.

In addition, the Attorney General already has the power to initiate a *parens patriae* action to enforce federal anti-trust laws under 15 USC § 15c, and under section 204(c) of the Commonwealth Attorneys Act, the Attorney General has the power "to represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth."

As a result, because there is no Pennsylvania antitrust law, the power of the Attorney General to enforce antitrust laws is currently limited to the authority granted to states to enforce federal antitrust laws provided by 15 U.S. Code § 15c. The Office of Attorney General cannot expand its powers to enforce antitrust laws beyond what is granted by section 204(c) of the Commonwealth Attorneys Act by a rule. Doing so both violates the Commonwealth Attorneys Act and converts the UTPCPA into a state antitrust law.

Over the last 30 years, PA attorneys general have sought to enact a state antitrust law, but these efforts have been consistently declined by the General Assembly. We do not believe that the Attorney General should be permitted by rule to do what he has not been authorized to do by law.

There is also a deep and rich body of policy precedent regarding the interpretation and application of Federal antitrust laws. To authorize the PA Attorney General to independently determine whether contracts, combinations or conspiracies in restraint of trade are unlawful risks creating separate and distinct body of state anti-trust law and precedent not grounded in federal jurisprudence. Even if unfair trade market practices are defined as unfair methods of competition and unfair or deceptive acts or practices, the regulations should require conformity with Federal antitrust precedent and practices.

Furthermore, one reason a state antitrust law has been rejected is because under a *parens patriae* action, 15 USC 15c(b)(2) allows any person on whose behalf a state attorney general brings an *parens patriae* action for damages to elect to be excluded from the action to pursue a private claim. Likewise, under 15 USC 15c(c)(2), a prevailing defendant in a *parens patriae* action may be awarded attorneys' fees. By attempting to convert the UTPCPA into a state antitrust law, the attorney general is eliminating these important protections because they neither are (nor can be) incorporated into the proposed rule.

Under federal law, state attorneys general are also not given the independent power to enjoin contracts, combinations and conspiracies in restriction of trade. Because doing so affects interstate commerce, these powers should exclusively fall within the authority of the U.S. Department of Justice.

Finally, it is important to note that the Federal Trade Commission Act ("FTCA"), upon which the Attorney General has indicated these regulations must be based, does not give the Federal Trade Commission ("FTC") the power to enjoin or recover damages for domestic violations of antitrust laws. Section 6(c) of the FTCA gives the Attorney General the power to make recommendations regarding how to implement final antitrust decrees; section 6(d) permits the Attorney General the power to make recommendations to the President or Congress; section 6(e) authorizes the Attorney General to make recommendations regarding the re-adjustment of businesses found to be in violation of antitrust laws; and section 7 allows the Attorney General to act as a master in chancery for the purpose of recommending remedies for antitrust violations. Nothing in the FTCA defines antitrust violations as unfair or deceptive acts or practices.

Unfair Conduct

The proposed rule defines "unfair conduct" to mean "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."

Because the catch-all clause applies only to "engaging in other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding," allowing any unfair conduct under the proposed definition to be "unfair methods of competition and unfair or deceptive acts or practices" eliminates the requirements that the conduct (1) is either fraudulent or deceptive; and (2) creates the likelihood of confusion or misunderstanding. A regulation cannot validly interpret a statute and conflict with the provisions of the statute it is attempting to interpret.

Such an interpretation of what constitutes "unfair conduct" should also be rejected because it is so broad that it fails to give any reasonable guidance regarding the meaning of the term.

Deceptive Conduct

The proposed rule defines "deceptive conduct" as "a method, act or practice which has a capacity or tendency to deceive." The proposed rule effectively eliminates the requirement that under the catch-all clause conduct must be both "deceptive" and "create a likelihood of confusion or misunderstanding."

For the reasons set forth in a joint amicus brief filed by PA Bankers and others in the *Gregg v. Ameriprise* appeal pending before the PA Supreme Court, these are separate and distinct requirements. A rule that treats them as effectively meaning the same thing violates the Statutory Construction Act which requires that all provisions of a statute must be given force and effect and that language of a statute should not be treated as surplusage.

We suggest because of the importance of these issues, it would be prudent to delay action on the rule until the Supreme Court addresses the issue of whether conduct that represents neither

fraudulent misrepresentation nor negligent misrepresentation can fall within the limits of the catch-all clause.

OAG's limited authority regarding financial institutions

The OAG's proposed regulation is based on the premise that the scope of the OAG's authority under the UTPCPL must be co-extensive with the power granted to the Federal Trade Commission by section 5 of the Federal Trade Commission Act ("FTCA").

Section 5 of the FTCA, 15 USC § 45(a)(2), provides that the Federal Trade Commission 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. Instead this authority is granted exclusively to bank regulatory authorities.

This limitation is similar to Section 506 of the Department of Banking & Securities (DoBS) Code which gives the OAG the power to initiate judicial proceedings to enforce consumer protection laws only upon the request of or with the approval of the DoBS, and gives the DoBS exclusive jurisdiction to conduct visitorial examinations of banks, savings associations and credit unions, except as requested by the DoBS or authorized by the DoBS on a case-by-case basis. To the extent a final regulation is adopted, it should incorporate these requirements of the DoBS Code. To be clear, however, PA Bankers does not support the final adoption of these rules, even if amended.

PA Bankers would appreciate the opportunity to discuss its concerns with you. We look forward to that occasion.

Sincerely,



J. Duncan Campbell III
President and CEO

cc:

The Honorable Lisa Baker, Majority Chair, Senate Judiciary Committee; Michael Cortez, Executive Director
The Honorable Larry Farnesc, Minority Chair, Senate Judiciary Committee; Sarah Speed, Legislative Director
The Honorable Tommy Tomlinson, Majority Chair, Senate Consumer Protection & Professional Licensure; Jen Smeltz, Executive Director
The Honorable Lisa Boscola, Minority Chair, Senate Consumer Protection & Professional Licensure; Jerry Livingston, Executive Director

The Honorable Rob Kauffman, Majority Chair, House Judiciary Committee; Tom Dymek, Executive Director
The Honorable Tim Briggs, Minority Chair, House Judiciary Committee; Tim Clawges, Executive Director
The Honorable Brad Roae, Majority Chair, House Consumer Affairs Committee; Phillip Kirschner, Executive Director
The Honorable Robert Matzle, Minority Chair, House Consumer Affairs Committee; Elizabeth Rosentel, Executive Director

Michael A. Vereb, Director of Government Affairs, Office of Attorney General