Received 1/9/2020 2:45:56 PM Supreme Court Middle District

Filed 1/9/2020 2:45:00 PM Supreme Court Middle District
81 MAP 2019

In the Supreme Court of Pennsylvania

Docket Nos. 81 & 82 MAP 2019

Commonwealth of Pennsylvania,

Appellee,

vs.

Chesapeake Energy Corporation *et al.*,

Appellants.

On appeal from an opinion and order of the Commonwealth Court dated March 15, 2019, at Docket No. 58 CD 2018, affirming an order of the Bradford County Court of Common Pleas at Docket No. 2015IR0069 dated December 15, 2017, overruling preliminary objections and certifying immediate interlocutory review

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, THE PENNSYLVANIA BANKERS ASSOCIATION, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE INSURANCE FEDERATION OF PENNSYLVANIA

GA BIBIKOS LLC

George A. Bibikos
5901 Jonestown Rd. # 6330
Harrisburg, PA 17112
(717) 580-5305
gbibikos@gabibikos.com

Counsel for Amici
PCCJR, PBA, NFIB, and IFP

January 9, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

Constitutional Provisions

Rules

Other Authorities

Rules

Treatises

Attachments

Tab "A" Office of Attorney General Proposed Regulation #59-10 (IRRC #3242), *Unfair Market Trade Practices*.

Tab "B" Comments of the Independent Regulatory Review Commission to Office of Attorney General Proposed Regulation #59-10 (IRRC #3242), *Unfair Market Trade Practices*.

I. INTRODUCTION

In this case, the Attorney General invoked a consumer protection statute, narrowly designed to protect buyers in consumer transactions, to challenge private agreements governing the acquisition of oil and gas rights. Invoking the same statute, the Attorney General pursued antitrust claims and remedies against the appellants, alleging that anti-competitive behavior in the context of acquiring oil and gas leases somehow negatively affected the market for landowners who wished to lease their oil and gas rights.

The Commonwealth Court endorsed the Attorney General's positions, holding (for the first time ever) that the Consumer Protection Law prohibits allegedly unfair or deceptive practices in the context of essentially any commercial transaction, not just unfair or deceptive practices by sellers as the General Assembly intended. The court also agreed with the Attorney General that the Consumer Protection Law essentially is a *de facto* state antitrust law through which the Attorney General may pursue antitrust claims and remedies.

This Court should reverse both holdings. The Commonwealth Court's decision removes limitations on the Attorney General's powers

that the General Assembly imposed, endorses an unprecedented level of government intervention into the private affairs of contracting parties, and exposes the business community to possible attorney-general scrutiny every time they engage in any commercial transaction.

The Commonwealth Court's second holding fares no better. The General Assembly has never enacted a state antitrust law, therefore neither the Attorney General through creative pleading or proposed regulations, nor the judiciary through statutory interpretation, can use the Consumer Protection Law as a means to impose antitrust liability or to pursue antitrust remedies. By concluding otherwise, the Commonwealth Court engaged in policymaking rather than serving as a court of error-correction. If left to stand, the court's decision will fundamentally alter the legal framework in Pennsylvania on which members of the business community have long relied to conduct their affairs in accordance with federal antitrust law, policy, and procedure.

For these and other reasons described in more detail below, the Pennsylvania Coalition for Civil Justice Reform ("PCCJR"), the Pennsylvania Bankers Association ("PBA"), the National Federation of Independent Business ("NFIB"), and the Insurance Federation of

Pennsylvania ("IFP") (together the "Associations") urge the Court to hold that the Consumer Protection Law regulates only the unlawful conduct of sellers. The Associations further ask the Court to recognize that the legislature has never enacted an antitrust statute and therefore the Attorney General is not empowered to pursue antitrust remedies under the Consumer Protection Law.[1]

II. INTERESTS OF *AMICI*

The PCCJR is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional and trade associations, health care providers, energy development companies, nonprofit entities, taxpayers, and other entities across market sectors in Pennsylvania. The PCCJR is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The PBA 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 Bankers Association supports the diverse needs of its

[1] No person or entity other than the amici, their members, or counsel paid for or authored the brief in whole or in part. *See* Pa.R.A.P. 531(b)(2).

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.

The NFIB is the nation's leading association of small businesses, representing members in all 50 states and the District of Columbia. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees, many of which operate in Pennsylvania.

The IFP is a non-profit trade association that enjoys a proud history of accomplishment representing companies from all segments of the industry. Its members are large and small, domestic, and foreign and represent half of the premium volume written in Pennsylvania. The IFP's advocacy on behalf of its members focuses on legislative and regulatory matters and it also plays an active role in litigation and other forums where the industry's interests are implicated.

The Associations have a significant interest in the outcome of this case. The Commonwealth Court's decision interprets the Consumer Protection law in a way that expands the Attorney General's authority to challenge virtually any commercial transaction in the Commonwealth, and it has endorsed the Attorney General's position that the statute serves as a vehicle to pursue antitrust claims. This exposes businesses to private causes of action in antitrust, a result never authorized by the General Assembly. The court erred in many respects and its rationale promotes bad policy that the General Assembly never intended.

For these and other reasons described in more detail below, the Associations urge the Court to reverse.

III. ARGUMENT

The appellants will no doubt address in great detail the points of law and authorities that compel the Court to reverse the Commonwealth Court's opinion and order. The Associations write to provide additional perspectives from their member companies that operate in a wide range of commercial industries throughout the Commonwealth.

A. The Court should hold that the Consumer Protection Law does not apply in this case.

The Associations agree with appellants that the Consumer Protection Law only regulates the conduct of sellers in order to protect buyers in a consumer transaction. The Associations write because the Commonwealth Court's contrary decision implicates transactions beyond the oil and gas context. If left to stand, the court's decision will remove limitations on the Attorney General's powers that the General Assembly imposed, grant the Attorney General an unprecedented level of power over private contracts, and possibly expose the business community to attorney-general enforcement actions every time they engage in a commercial transaction.

1. The Consumer Protection Law only regulates the conduct of sellers to protect buyers in consumer transactions.

The Consumer Protection Law is a Pennsylvania statute modeled after the Federal Trade Commission Act in that it is designed to protect consumers from unfair or deceptive tactics employed by sellers of goods or services. *See Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 817-18 (Pa. 1974); 15 U.S.C. § 45. The Attorney General only has the authority to pursue actions under the Consumer Protection Law for

"[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of ***any trade or commerce*** as defined by subclauses (i) through (xxi) of clause (4) of section 2 of this act … ." 73 P.S. § 201-3 (emphasis added).

The phrase "'trade and commerce'" means "***advertising, offering for sale, sale or distribution*** of any services and any property" including any such activities "directly or indirectly affecting the people of this Commonwealth." *See* 73 P.S. § 201-3(3) (emphasis added).

As alleged in the Attorney General's complaint, the appellants and landowners entered into oil and gas leases whereby the appellants acquired the oil and gas rights in fee simple in exchange for up-front payments to the landowners, the opportunity for royalties on production, and a reversionary interest if the lease expires by its terms. The appellants (lessees) did not engage in any advertising, offering for sale, selling or distributing" any goods, services, or property.

The conduct at issue in this appeal does not qualify as "trade and commerce" as defined by the statute. Consequently, the Attorney General lacked the authority to pursue a cause of action against the appellants.

2. The court's decision removes limitations on the Attorney General's powers that the General Assembly imposed.

Notwithstanding the straightforward analysis above, the Commonwealth Court construed the Consumer Protection Law for the first time in a way that questions the conduct of buyers in a transaction. The court invoked dictionary definitions of "trade" and "commerce" instead of relying on the statute's definition and held that the Attorney General may challenge any allegedly unfair or deceptive practices "regardless of who is committing these unlawful acts." Slip Op. at 11. The court erred, and the implications of its holding extends beyond the oil and gas context.

Although the court's decision is couched in terms of statutory interpretation, the General Assembly's definition of "'trade and commerce'" is not only an indication of legislative intent. The definition serves as a limitation imposed by the General Assembly on the Attorney General's power to pursue actions for violations of the statute.

As this Court is aware, the Attorney General has no inherent powers. *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986). He or she is an elected member of the executive branch of government, *see* PA.

CONST. art. IV, § 1, and can exercise only those powers prescribed by the General Assembly either expressly or by necessary implication. *See* PA. CONST., art. IV § 4.1 (the Attorney General "*shall exercise such powers and perform such duties as may be imposed by law*.") (emphasis added); Commonwealth Attorneys Act, Act of Oct. 15, 1980, P.L. 950, *as amended*, 71 P.S. § 732-201; *Commonwealth, Dep't of Envtl. Res. v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982).

The General Assembly authorized the Attorney General to pursue violations of the Consumer Protection Law under specific circumstances: (1) the Attorney General has reason to believe that a person is engaged in activity "declared unlawful" by the statute; and (2) the proceedings would be in the public interest. *See* 73 P.S. § 201-4. The Consumer Protection Law "declares unlawful" any unfair or deceptive practices during "advertising, offering for sale, selling or distributing" goods, services, or property in a consumer transaction that (among other things not at issue here) are likely to cause confusion or misunderstanding. *See* 73 P.S. § 201-2(xxi). If the conduct at issue does not qualify, the Attorney General lacks authority to proceed with a cause of action.

The Commonwealth Court failed to consider that a broader interpretation of "trade and commerce" removes the limitations on the Attorney General's authority to pursue actions under the Consumer Protection Law that the General Assembly expressly imposed. These limitations must be strictly construed. *See Murphy v. Pa. Human Relations Comm'n*, 486 A.2d 388 (Pa. 1985) ("[I]t is equally clear that the power of the [agency] results from the legislatures delegation of such power. As such the limits of that power must be strictly construed."). Although the government may have authority to protect the consuming public from unfair or deceptive behavior, the court's interpretation of the statute leaves nothing in place to channel the Attorney General's exercise of discretion to achieve the goal of protecting consumers.

By endorsing a broad interpretation of the Consumer Protection Law, the Commonwealth Court improperly bestowed upon the Attorney General more powers than the General Assembly granted.

3. The court's decision exposes the business community to enforcement actions every time they engage in any commercial activity.

The court's decision on this issue has implications beyond the oil and gas context. Given the breadth of the court's decision, it affects many more commercial transactions throughout the Commonwealth.

There are more than two million small and large businesses in Pennsylvania, *see* U.S. SBA, "2018 Small Business Profile: Pennsylvania" (2018), *available at* https://bit.ly/2kv1kPA (last visited Jan. 9, 2020), all of which enter into an infinite number of commercial transactions in the course of their operations. The business community understands that the Consumer Protection Law prohibits unlawful conduct identified in the statute if or when engaged in selling consumer goods, products, or services. If disputes arise outside of the consumer sales context, private plaintiffs may have other remedies to pursue, but the Attorney General has no standing to pursue an action in the name of the Commonwealth.

The court's decision essentially means the Attorney General can bring an action to challenge not only consumer sales transactions as the law intended but virtually any business-to-business transactions

involving companies of all shapes and sizes based on one government official's view of what is fair or not.

Without anything left to channel the Attorney General's discretion, he is now free to act as the "contract police" and potentially challenge and enjoin any commercial transaction based on mere subjective belief that it is unfair or deceptive to one of the parties in some way. That level of government intervention into private contract affairs cuts against fundamental principles restricting the state's ability to alter contract obligations. *See* U.S. CONST. art I, § 10; PA. CONST. art. I, § 17.

Moreover, the Commonwealth Court's decision arrives on the heels of *Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930, 940 (Pa. Super. 2018), *petition for allowance of appeal granted*, No. 29 WAP 2019 (Pa.) (pending), in which a panel of the Superior Court created a new "strict liability" standard that applies when private parties sue under the "catch-all" provision of the statute alleging that unfair or deceptive trade practices caused "confusion" or "misunderstanding." This Court is poised to decide that case.

If the decisions in this case and in *Gregg* are left to stand, members of the business community will face (a) many more attorney-general

actions than before based solely on the Attorney General's inclination to challenge any allegedly unfair or deceptive transaction and (b) strict liability if they are sued either by the Attorney General or by private plaintiffs under the "catch-all" provision, based not on deceptive conduct by the defendant but based solely on the counter-party's level of alleged confusion or misunderstanding. In turn, the statute will no longer serve the singular purpose of protecting buyers in consumer transactions but will serve as a basis for the Attorney General or private plaintiffs to exercise a veto power over private agreements. The General Assembly could not have intended that result.

Accordingly, the Court should reverse and hold that the Consumer Protection Law only prohibits unfair or deceptive trade practices by sellers in order to protect buyers involved in consumer transactions as the General Assembly intended.

B. The Court should hold that the Consumer Protection Law is not an antitrust statute.

Having determined that the Consumer Protection Law limits the Attorney General's authority to challenge only the conduct of sellers in a consumer transaction, the question then becomes whether the Commonwealth Court erred by concluding that the Attorney General

may invoke the Consumer Protection Law to pursue antitrust claims and remedies. The answer is yes, and the court's error engenders legal and practical concerns for members of the business community.

1. Absent a state antitrust statute, federal antitrust laws and procedures apply in Pennsylvania.

Antitrust laws such as the Sherman Act, and the Clayton Act, as amended by the Robinson-Patman Act, along with their state counterparts, are designed primarily to protect markets and competition and prevent monopolization. *See Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. 231, 248 (1951); Herbert Hovenkamp, *Federal Antitrust Policy* § 2.1, at 47-48 (2d ed. 1999).

When state legislatures elect to protect markets and competition within their borders and establish remedies for violations, they do so by legislation. *See* 6 Trade Reg. Rep. (CCH) ¶ 30,000 *et seq*. (listing states with antitrust statutes). Absent a state antitrust law, state attorneys general have *parens patriae* standing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to bring actions on behalf of their states' citizens, relying on federal antitrust laws to challenge anticompetitive conduct in their respective states. *See* 15 U.S.C. § 15c-h.

The General Assembly enacted the Consumer Protection Law to protect consumers. *See Monumental Props.*, 329 A.2d at 815. In other contexts, the General Assembly enacted industry-specific consumer protection measures that include specific antitrust provisions. *See, e.g.*, Unfair Insurance Practices Act, Act of July 22, 1974, P.L. 589, *as amended*, 40 P.S. § 1171.1 *et seq.*; Article XIV of the Insurance Company Law of 1921, Act of May 17, 1921, P.L. 682, *added by* the Act of December 18, 1992, *as amended*, 40 P.S. § 991.1401 *et seq*.

However, it is well documented that the General Assembly has never enacted a generally applicable antitrust statute, having tried and failed on at least 24 occasions. *See* R. at 675a. In Pennsylvania, as in other states without an antitrust law, the Attorney General has the authority to enforce federal antitrust laws for anti-competitive conduct that occurs within the Commonwealth, *see* 71 P.S. § 732-204(c), but the law on which those claims are based is federal law and the venue for those claims is federal court. *See* 28 U.S.C. § 1331.

Under the Commonwealth Attorneys Act, the Attorney General only has the power to initiate proceedings to enforce antitrust laws to the extent authorized by federal law or pursuant to a separately enacted

Pennsylvania antitrust statute (if one exists). Section 204(c) of the Commonwealth Attorneys Act provides in part that "[t]he Attorney General shall represent the Commonwealth and its citizens in any action brought ***for violation of the antitrust laws of the United States and the Commonwealth***." 71 P.S. § 732-204(c) (emphasis added).

The September 1978 report of the Joint State Government Commission, upon which Section 204 of the Commonwealth Attorneys Act is based, explains scope of the Attorney General's antitrust enforcement powers as follows:

> Authority of the Attorney General to bring antitrust actions has been specifically referenced. Such authority is presently provided by amendments to the federal antitrust laws empowering Attorneys General to bring civil actions thereunder as *parens patriae* (§ 4C, Pub.L. 94-435, 15 U.S.C. § l5c); the General Assembly now has before it 1977 House Bill 845 which would create intrastate antitrust enforcement authority for the Attorney General.

General Assembly of Pennsylvania, Joint State Government Commission, *Office of Elected Attorney General* at 11 (September 1, 1978) ("JSGC Report"). Although the JSGC Report identifies H.B. 845 of 1977 (which, if enacted, would have created a state antitrust statute), the General Assembly never passed H.B. 845 or any other bill creating an antitrust statute.

Moreover, the antitrust provisions of the Commonwealth Attorneys Act are separate and distinct from the provisions of that act conferring powers upon the Attorney General to enforce consumer protection laws. The JSGC Report lists the powers of the Attorney General under the Consumer Protection Law as arising under the consumer affairs provisions of the Commonwealth Attorneys Act, *not* the antitrust provisions of that act:

> The Attorney General is given primary responsibility to administer and enforce the recently enacted programs to serve the needs of consumers. Specifically, the administration of the consumer protection provisions in Sections 917 through 922 of The Administrative Code of 1929 are retained in Section 204(d), p. 26. The Attorney General is given the sole authority to appoint the advisory committee established under Section 922. The Attorney General also continues to administer and enforce the provisions of the Unfair Trade Practices and Consumer Protection Law, act of December 17, 1968, P.L. 1224, No. 387, Sections 3.1, 4, 5, 8 and 9.

See JSGC Report at 12. Thus, the Attorney General derives antitrust enforcement powers from Section 204(c) of the Commonwealth Attorneys Act while deriving separate powers to enforce consumer protection laws under Section 204(d) of the Commonwealth Attorneys Act.

Consequently, unless the General Assembly enacts a state antitrust law, the Attorney General's power to commence antitrust proceedings is limited to *parens patriae* proceedings authorized by federal law.

2. Neither the courts nor the Attorney General have the authority to use the Consumer Protection Law as a *de facto* antitrust statute.

Despite this framework, the Commonwealth Court held for the first time that "the Attorney General may pursue antitrust claims through the [Consumer Protection Law] where the so-called 'antitrust' conduct qualifies as 'unfair methods of competition' or 'unfair or deceptive acts or practices,' as those terms have been either statutorily defined in the [Consumer Protection Law] or by the Attorney General through the administrative rulemaking process."

In effect, the court held that the Consumer Protection Law is a *de facto* state antitrust statute through which the Attorney General can pursue antitrust remedies and can promulgate rules to define anticompetitive behavior. In the wake of the Commonwealth Court's decision, the Attorney General has published for public comment a series of proposed regulations purporting to expand his powers under the

Consumer Protection Law to regulate markets and competition. A copy of the Attorney General's proposed regulations is appended at Tab "A."[2]

Neither the courts nor the Attorney General have the authority to use the Consumer Protection Law as an antitrust statute. The General Assembly exercises the legislative function in this Commonwealth, not the courts or the Attorney General. PA. CONST. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.").

The General Assembly is best equipped to engage in policymaking. "The Legislature, with unique factfinding capacities designed not only to correct but also to anticipate social problems, both broadly declares public policies and minutely provides for the details of implementation." *Laudenberger v. Port Auth. of Allegheny Cty.*, 73, 436 A.2d 147, 158 (Pa. 1981) (Roberts, J., dissenting).

The policymaking function, unlike the judicial function, is forward looking, punishing not past behavior but setting forth what the law will

[2] This Court may take judicial notice of proposed regulations published in the *Pennsylvania Bulletin*. *See* Pa.R.E. 201; 42 Pa.C.S. § 506 ("The contents of the code, of the permanent supplements thereto, and of the bulletin, shall be judicially noticed.").

be in the future so that those affected by it can conform their behavior. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1129 (Pa. 2014) ("For one thing, 'judicial' acts are those which determine the existing law in relation to existing facts, and which apply the law to the subject matter before the court, while a 'legislative' act is a determination of what the law will be in the future.").

The legislative process involves, for example, drafting proposals, holding committee hearings, debating and amending provisions, conducting studies on and evaluations of the implications on the public and specific stakeholder groups, reviewing economic considerations, debating constitutional and other considerations, reaching compromises to obtain consensus from opposing political parties, full consideration by both the House and Senate, and subject to Governor approval or veto.

Although there can be many reasons or motives for failing to enact legislation, if the process does not result in an act of the General Assembly that becomes law, the General Assembly has signaled to the other branches of government that the legislative body as a whole is unable to form a consensus on a given enactment.

Those concepts apply here. The General Assembly has never enacted a state antitrust law. Although inaction in itself is not dispositive, the failure on 24 occasions to reach a consensus on a state antitrust bill, at a minimum, should signal to the courts and the Attorney General the implicit (if not express) choice of leaving in place the current framework, *i.e.*, relying on federal law, policy, and procedure to regulate anticompetitive behavior that takes place in this Commonwealth.

Yet, one error-correcting court and one official of the executive branch – both part of the two branches of government least equipped to set policy – have decided that a violation of a consumer protection law with different provisions and different purposes can also constitute a violation of antitrust law. They are both wrong.

a. The Attorney General cannot promulgate antitrust regulations.

Although the Commonwealth Court's decision invites the Attorney General to promulgate regulations, the Attorney General's proposed regulations have sparked considerable criticism from the business community and the Independent Regulatory Review Commission ("IRRC") – which serves as a gatekeeper to determine the viability of proposed regulations under the Regulatory Review Act, Act of June 30,

1982, P.L. 73, *as amended*, 71 P.S. §§ 745.1-745.14 – for circumventing fundamental principles of administrative law that limit agency powers. A copy of the IRRC's comments is appended at Tab "B."[3]

The administrative law principles summarized in the previous section of this brief apply when evaluating an officer or agency's ability to promulgate regulations. In addition, the General Assembly may confer authority and discretion upon another body in connection with the execution of a law but the legislation "must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Eagle Environmental. II, L.P. v. Commonwealth*, 884 A.2d 867, 880 (Pa. 2005). In other words, the General Assembly must make the basic policy choices that will guide the officer or agency's administration of the statute through regulations. *See Blackwell v. State Ethics Comm'n*, 567 A.2d 630 (Pa. 1989). Otherwise, the delegation fails under Article II, § 1 of the Pennsylvania Constitution.

Apart from constitutional considerations, the IRRC evaluates proposed regulations to determine whether the sponsoring agency has

[3] The Court may also judicially notice on appeal IRRC's comments and other comments submitted to IRRC. *See* Pa.R.E. 201(c)(2), (d).

the authority to promulgate them and whether they comport with the legislature's intent. *See* 71 P.S. §§ 745.1– 745.14. Similarly, the courts have held that a regulation is only valid and binding if it is "(a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *See Tire Jockey Serv., Inc. v. Dep't of Envtl. Res.*, 915 A.2d 1165, 1187 (Pa. 2007).

Relying largely on the Commonwealth Court's decision, the Attorney General proposed regulations that would rewrite the Consumer Protection Law to govern (and potentially make *per se* illegal) conduct not involving consumer protection but conduct tending to harm competition and markets.

For example, the proposed regulations would impose restrictions on certain resale pricing activities, tying arrangements, and refusals to deal, all of which are subject to regulation under federal antitrust statutes such as the Sherman Act and the Clayton Act, are not *per se* illegal under federal law, and generally subject to a "rule of reason" analysis by the courts. *See, e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (resale prices); *Allen-Myland, Inc. v. Int'l Bus. Mach. Corp.*, 33 F.3d 194, 201 (3d Cir. 1994) (tying arrangements); *Northwest*

Wholesale Stationary, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985) (refusals to deal).

The IRRC's comments to the Attorney General's proposal echo the concerns raised by many organizations and members of the business community that the Attorney General is not authorized under the Consumer Protection Law to promulgate antitrust regulations. The Commonwealth Court erred by essentially endorsing the regulatory effort of the Attorney General.[4] As IRRC explained in its comments:

> The proposed regulation significantly expands the [Consumer Protection Law] 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 [Consumer Protection Law] class action settlements and to issue subpoenas.

See IRRC Comments at 5.

In addition, IRRC questioned the Attorney General's authority to promulgate expansive regulations without specific legislative approval:

- IRRC "found no indication that there was an intent by the legislature for the [Consumer Protection Law] to be expanded

[4] The comments may be accessed on the IRRC's website at the following link: http://www.irrc.state.pa.us/regulations/fullList.cfm?ID=3253&typ=ppc (last visited Jan. 9, 2020).

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***." *See* IRRC Comments at 2 (emphasis added).

- IRRC also questioned whether the Attorney General should defer to the General Assembly to fill a perceived gap in the statute and "whether the extension of the OAG's enforcement power ***is a matter for which the OAG should seek legislative approval***." *See* IRRC Comments at 2 (emphasis added).

- Finally, IRRC noted that the Consumer Protection Law is not an antitrust statute, noting that "[t]he long history of legislative efforts to adopt antitrust provisions in the form of a separate, freestanding statute demonstrates that the [Consumer Protection Law] ***was not intended by the General Assembly to be an antitrust law***." *See* IRRC Comments at 5 (emphasis added).

The Attorney General's proposed regulations rewrite the law and therefore far exceed the legislative grant of authority to promulgate regulations only as necessary "for the enforcement and administration" of the Consumer Protection Law as written.

b. The Commonwealth Court cannot legislate state antitrust policy by judicial decision.

For its part, the Commonwealth Court bypassed its role as a court of error-correction and engaged in policymaking by interpreting the Consumer Protection Law as a *de facto* antitrust statute, even though the General Assembly never enacted one, by inviting the Attorney General

to assume the legislature's role, and by encouraging regulations that define more unlawful conduct than the statute prescribes.

This Court has long recognized that courts are ill-equipped to engage in policymaking. *See, e.g.*, *Martin v. Unemployment Comp. Bd. of Review*, 466 A.2d 107, 111-13 (Pa. 1963) ("To be sure, courts must take great care in wading deeply into questions of social and economic policy, which we long have recognized as fitting poorly with the judiciary's institutional competencies."). As Chief Justice Stern aptly wrote long ago:

> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal. Familiar illustrations are those involving unreasonable restraints of marriage or of trade, collusive arrangements for obtaining divorces, suppression of bids for public contracts, interference with freedom of conscience or religion. ***If, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation, and each such court would be creating positive laws according to the***

> ***particular views and idiosyncrasies of its members.*** Only in the clearest cases, therefore, may a court make an alleged public policy the basis of judicial decision.

Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941) (emphasis added).

These lessons apply with equal vigor in this case. The answer to the question of whether the Commonwealth has an antitrust statute is "no." The question of whether or not the Commonwealth *should* have an antitrust statute of its own is one reserved for the General Assembly. There is no compelling public need for the judiciary to declare that, in the absence of a state antitrust law, the Consumer Protection Law (designed for other purposes) must be read as filling that void.

The lack of an antitrust statute in Pennsylvania means that any such claims brought by the Attorney General should go to federal court where venue is settled and the rules are well known. If the General Assembly never enacted an antitrust statute to replace this framework, neither the Attorney General nor the judiciary can make it so by interpreting a consumer protection as a *de facto* antitrust statute.

3. The court's decision changes the antitrust framework on which businesses operating in Pennsylvania have long relied.

If left to stand, the Commonwealth Court's decision will change the framework on which businesses operating in Pennsylvania have long relied, namely, that federal antitrust law and policy regulate anticompetitive behavior in Pennsylvania. Under the current framework, for example:

- The Attorney General has the authority to pursue antitrust claims in federal court under federal law. *See* 15 U.S.C. § 15c-h; 71 P.S. § 732-204(c).

- The standards for evaluating antitrust claims (*i.e.*, either *per se* or under a "rule of reason") are well settled under federal law. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001) ("Once there is the finding of antitrust injury, courts examine the alleged illegal conduct under one of two distinct tests: *per se* violation or rule of reason.").

- The Attorney General can only pursue specific remedies under federal antitrust laws. 15 U.S.C. § 15c(a)(1)-(2).

- Other stakeholders (such as, for example, the landowners in this case) have the right to opt out of an attorney-general action and elect to proceed on their own or deal with the antitrust defendant outside of the litigation. 15 U.S.C. § 15c(b).

- The statute of limitations is generally four years. 15 U.S.C. § 15b.

- Antitrust defendants can recover attorneys' fees if they prevail in federal court. 15 U.S.C. § 15c(d)(2).

The Commonwealth Court's decision changes this framework. Under the Commonwealth Court's decision:

- The Attorney General can now use the Consumer Protection Law (a state statute) to pursue antitrust claims in state courts. 73 P.S. § 201-4; 42 Pa.C.S. § 761(a), (b).

- By invoking a state statute to pursue what are otherwise federal antitrust claims, the Attorney General can (as in this case)[5] avoid removal to federal court. *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir. 2014).

- There are no real or clear standards to determine what is "unfair" or "deceptive" or "confusing" or a "misunderstanding," yet that type of conduct may render conduct otherwise lawful under antitrust laws unlawful under the Consumer Protection Law.

- The statute of limitations under the Consumer Protection Law is six years, not four. *See, e.g.*, *Gabriel v. O'Hara*, 398, 534 A.2d 488, 496 (Pa. Super. 1987) (applying six-year statute to private actions).

- The Attorney General can pursue remedies under the Consumer Protection Law, including preliminary and permanent injunctive relief, *see* 73 P.S. § 201-4; restitution for permanent injunctive relief, *see* 73 P.S. § 201-4.1; civil penalties, *see* 73 P.S. § 201-8; license revocation, *see* 73 P.S. § 201-9; and appointment of receivers, *see* 73 P.S. §201-9.1,

[5] In this case, the appellants removed the matter to federal court after the Commonwealth amended its complaint to argue that violations of the Consumer Protection Law also constituted violations of the Sherman Act, but a federal judge remanded the matter to state court on the theory that the Commonwealth invoked state law to impose liability, not federal antitrust law. *Commonwealth v. Chesapeake Energy Corp.*, No. 16-1012 (M.D. Pa., Aug. 15, 2016).

presumably in addition to remedies available to attorneys general pursuing antitrust claims in federal court.

- Antitrust defendants cannot recover attorneys' fees if they prevail in a state court, even if they are vindicated, as they could in federal court.

The court's decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. *See, e.g.*, *State v. Philip Morris, Inc.*, Nos. 96122017 and CL211487, 1997 WL 540913, at *6 (Md. Cir. Ct. May 21, 1997) ("Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function."). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot "expand coverage to subsume other remedies." *See Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R.R.*

Passengers, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

Finally, the Commonwealth Court's decision not only expands the Attorney General's authority beyond what the statute allows but also expands the "citizen suit" provision. The phrase "trade and commerce" under the statute serves as a predicate for any violation of the Consumer Protection Law. Because the court defined that phrase broadly, the court's decision may be read to expand the rights of private parties to pursue antitrust claims for allegedly anticompetitive conduct during family or household sales transactions. *See* 73 P.S. § 201-9.2(a). As a result, the business community faces the threat of limitless antitrust lawsuits initiated not only by the Attorney General but by private parties, all without any legislative approval.

In the end, the courts and the Attorney General may believe the Commonwealth could benefit by having a state antitrust statute that prohibits anti-competitive behavior in the Commonwealth and confers upon the Attorney General the authority to pursue relief under state law in state court. But that is a decision for legislature, not the Attorney General or the courts.

Accordingly, the Court should reverse and hold that the Consumer Protection Law is neither a state antitrust law nor a statute through which the Attorney General may pursue antitrust claims or remedies.

C. The court's decision discourages economic investment in Pennsylvania.

There are additional economic and practical considerations worth noting beyond the legal and policy implications of the Commonwealth Court's decision identified above.

First, the Commonwealth Court's decision sets Pennsylvania apart from other states in the country. The Associations are unaware of any state legislature or court in the country that has applied a state consumer protection law with limiting language similar to Pennsylvania's statute to (a) question the conduct of buyers in a non-consumer transaction; (b) authorize an attorney general to challenge oil and gas lease transactions;

or (c) authorize the attorney general to use such a statute to pursue antitrust claims and violations.

Second, the court's unique and unforeseen interpretation of the statute creates new, more stringent, but less certain rules governing business activities in Pennsylvania. It is difficult for businesses to conform their behavior to the law if the Pennsylvania Attorney General or private plaintiffs can use a consumer protection law designed for other purposes to challenge any commercial transaction or use as a vehicle to allege antitrust violations and pursue antitrust remedies without any prior notice that either of those possibilities existed before a cause of action ensued.

Third, the threat of new causes of action creates uncertainty and unpredictability in the litigation environment that discourages economic investment. A recent poll of in-house lawyers at large companies suggests that a state's litigation environment influences business decisions "such as where to locate or where to expand business." *See* U.S. Chamber Institute for Legal Reform, *2017 Lawsuit Climate Survey: Ranking the States*, at 3 (Sept. 2017), *available at* https://bit.ly/2lXx7Jr (last visited Jan. 9, 2020). Members of the business community may reconsider

decisions to invest in the Commonwealth if they are forced to face potentially limitless lawsuits from the Attorney General or private parties challenging any commercial transaction as allegedly deceptive or anticompetitive.

Fourth, the court's decision has the potential to affect consumers. Studies indicate that litigation costs lead to price increases passed on to consumers. *See* Joanna M. Shepard, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Business, Employment and Production*, 66 VAND. L. REV. 257, 287 (Jan. 2013) ("increasing litigation costs will continue to increase prices, deterring potentially socially beneficial transactions"). If the court's decision leads to additional litigation, consumers will ultimately bear those costs.

Fifth, many members of *amici's* respective organizations and other *amici* filing briefs in this case are multi-state and multi-national businesses who invest capital in the Commonwealth based in substantial part on the certainty and predictability of statutory and regulatory programs that affect their businesses. Because the Commonwealth Court's decision blurs the lines that separates the functions of the legislative, executive, and judicial branches of government, the decision

signals to the business community that members cannot rely on the statutes and regulations as written.

Finally, the court's decision creates an intolerable level of uncertainty in the statutory and regulatory framework in the Commonwealth. This discourages economic investment and encourages reallocation of investments in other states where the rules are well defined. The court's decision does not promote the uniformity, predictability, and certainty embodied in a stable statutory and regulatory system on which businesses place great value when they decide whether and in which states they will invest their capital.

IV. CONCLUSION

WHEREFORE, the Court should reverse the opinion and order of the Commonwealth Court.

Respectfully submitted,

GA BIBIKOS LLC

/s George A. Bibikos

January 9, 2020

George A. Bibikos (PA 91249)
5901 Jonestown Rd. #6330
Harrisburg, PA 17112
(717) 580-5305
gbibikos@gabibikos.com

Counsel for the Associations

Tab “A”

RECEIVED IRRC 2019 AUG 27 A 10:53 INDEPENDENT REGULATORY REVIEW COMMISSION

REVISED 12/16

Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency

Office of Attorney General

(2) Agency Number: 59

Identification Number: 10

IRRC Number: 3242

(3) PA Code Cite: new 37 Pa. Code Ch. 311

(4) Short Title: Unfair Market Trade Practices.

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Primary Contact: Tracy W. Wertz, Chief Deputy Attorney General, (717) 787-4530 twertz@attorneygeneral.gov

Secondary Contact: Joseph S. Betsko, Senior Deputy Attorney General, (717) 787-4530, jbetsko@attorneygeneral.gov

(6) Type of Rulemaking (check applicable box):

X Proposed Regulation
☐ Final Regulation
☐ Final Omitted Regulation

☐ Emergency Certification Regulation;
☐ Certification by the Governor
☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The purpose of this rulemaking is to define and clarify certain terms under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) in line with state and federal case law. The proposed regulation defines certain anticompetitive conduct as unfair methods of competition and unfair or deceptive acts or practices. The rulemaking provides for the coordination of releasing claims between the Attorney General and private class litigants. The rulemaking also delegates responsibilities under The Administrative Code of 1929.

(8) State the statutory authority for the regulation. Include specific statutory citation.

Section 3.1 of the UTPCPL, 73 P.S. § 201-3.1.
Section 506 of the Administrative Code of 1929, 71 P.S. § 186.

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This proposed rulemaking is necessary to provide clear guidance to market participants and consumers as to what the Supreme Court meant when it agreed with the OAG in Monumental Properties that the scope of the UTPCPL generally covers all unfair and deceptive acts or practices in the conduct of trade or commerce. Com., by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 479 (1974). It also serves to synchronize the UTPCPL with the Federal Trade Commission Act on which it is based. Moreover, the rulemaking is necessary to clarify that the standing provision of the private right of action does not limit the scope of trade and commerce regulated by the Attorney General.

This proposed rulemaking is in the public interest to expressly enumerate additional methods, acts or practices in violation of the UTPCPL which would serve to lower the hurdle for consumers to access justice which would otherwise require proving a violation of the so-called catch-all provision.

Small businesses would also benefit from regulation of unfair market trade practices which would promote free and fair competition across all markets within the Commonwealth.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no provisions in the proposed rulemaking that are more stringent than federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

This proposed regulation is comparable with the overall unfair trade and consumer protection framework of many other states. As such, it is not anticipated to affect Pennsylvania's ability to compete with other states.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This proposed regulation will not affect any other OAG regulations or those of other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

During and following a public hearing on SB 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the UTPCPL and that the OAG should use the UTPCPL to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments. The proposed rulemaking results from the informed comments of the committee members. The OAG then conducted a public hearing on September 11, 2018, which was noticed in the Pennsylvania Bulletin published on August 11, 2018. The OAG received just one comment.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

This regulation will affect market participants and consumers positively across all markets within the Commonwealth by expressly confirming unfair trade and consumer protections through the enumeration of additional methods, acts or practices in violation of the UTPCPL which are otherwise inferred or implied in the so-called catch-all provision.

Moreover, the UTPCPL is a law of broad application and, as a consequence, it is not feasible to break out the impact between small and large businesses. However, this regulation is not anticipated to adversely affect small businesses, but rather to promote free and fair competition for all businesses and small businesses, which is in the public interest.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

All businesses within the scope of the UTPCPL will be required to comply.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Through this rulemaking, market participants and consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The rulemaking is expected to mitigate economic harm against market participants and consumers. The clear articulation of the proposed unfair market trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

There are no expected costs, so the benefits from improving the overall remedial nature of consumer protection outweigh any costs or adverse effects. A further benefit of the regulation is that it clarifies certain key terms of the UTPCPL for market participants and consumers.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the regulated community associated with this rulemaking since much of the provisions comport with federal standards as set forth in Paragraph 11 above. To the extent the regulated community is in compliance with the federal standards, there is no additional burden.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the local governments associated with this rulemaking.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No anticipated costs and/or savings to the state government associated with this rulemaking.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

There will be no additional procedures, forms or reports.

(22a) Are forms required for implementation of the regulation?

No.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

Not applicable.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. **Not applicable.**

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(23a) Provide the past three year expenditure history for programs affected by the regulation. **N/A**

Program	FY -3	FY -2	FY -1	Current FY

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.
(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
(c) A statement of probable effect on impacted small businesses.
(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

As described in Paragraph 15 above, there is no adverse impact expected on small business.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

Not applicable.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

The OAG considered the status quo and determined that the clear articulation of the proposed unfair trade practices regulation is the least burdensome acceptable alternative. This proposed rulemaking will provide clarity to the public and facilitate compliance with the regulation.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

a) The establishment of less stringent compliance or reporting requirements for small businesses;
b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
c) The consolidation or simplification of compliance or reporting requirements for small businesses;
d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The OAG considered the impact of this rulemaking on small businesses and determined that no adverse impact to small business is expected because the proposed regulation is designed to promote free and fair competition, which will inure to the benefit of small businesses and which is in the public interest.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Not applicable.

(29) Include a schedule for review of the regulation including:

A. The length of the public comment period:
30 days after publication of the proposed rulemaking in the *Pennsylvania Bulletin*.

B. The date or dates on which any public meetings or hearings will be held: September 11, 2018

C. The expected date of delivery of the final-form regulation: Fall 2019

D. The expected effective date of the final-form regulation: Fall 2019

E. The expected date by which compliance with the final-form regulation will be required: Fall 2019

F. The expected date by which required permits, licenses or other approvals must be obtained: Not applicable

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The regulation will be reviewed for its effectiveness annually.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

RECEIVED
IRRC

2019 AUG 21 A 10:33

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General	Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by:	Copy below is hereby approved as to form and legality. Executive or Independent Agencies.
BY: Amy M. Elliott (DEPUTY ATTORNEY GENERAL)	Office of Attorney General (AGENCY)	BY: [signature] 8/16/19 DATE OF APPROVAL
AUG 16 2019 DATE OF APPROVAL	DOCUMENT/FISCAL NOTE NO. 59-10 DATE OF ADOPTION: 8/2/19 BY: [signature] TITLE First Deputy Attorney General (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)	(~~Chief~~ Counsel, Independent Agency) (Strike inapplicable title)
☐ Check if applicable Copy not approved. Objections attached.		☐ Check if applicable. No Attorney General approval or objection within 30 days after submission.

PROPOSED RULEMAKING
COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

Unfair Market Trade Practices;
Notice of Proposed Rulemaking

Title 37—Law
Office of Attorney General
37 Pa. Code Ch. 311

PROPOSED RULEMAKING

OFFICE OF ATTORNEY GENERAL

[37 PA. CODE CH. 311]

Unfair Market Trade Practices; Notice of Proposed Rulemaking

[49 Pa.B.]
[Saturday, August 31, 2019]

Title 37—Law
Office of Attorney General
37 Pa. Code Ch. 311

The Office of Attorney General (OAG), through its Public Protection Division, proposes to amend 37 Pa. Code by adding a new Chapter 311 (relating to unfair market trade practices) to read as set forth in Annex A.

A. *Effective Date*

This proposed rulemaking will be effective upon publication in the *Pennsylvania Bulletin.*

B. *Contact Person*

For further information on the proposed rulemaking, the primary contact is Tracy W. Wertz, Chief Deputy Attorney General, Antitrust Section and the secondary contact is Joseph S. Betsko, Senior Deputy Attorney General, Antitrust Section, Pennsylvania Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120, (717) 787-4530. This proposed rulemaking is available on the OAG website at www.attorneygeneral.gov.

C. *Statutory Authority*

This rulemaking is proposed under the authority of section 3.1 of the Unfair Trade Practices and Consumer Protection Law (act) (73 P.S. § 201-3.1), regarding the statutory rulemaking authority of the OAG, and section 506 of The Administrative Code of 1929 (71 P.S. § 186), regarding general rulemaking authority.

D. *Purpose and Background*

The proposed rulemaking is designed to improve, enhance and update the OAG's unfair methods of competition and unfair or deceptive acts or practices regulations. The specific purpose of the proposed rulemaking is described in more detail under the summary of proposal.

E. *Summary of Proposed Rulemaking*

1. *Introduction*

The OAG enforces and administers the act. The OAG has determined that it is necessary for the enforcement and the administration of the act to add regulations concerning unfair market trade practices.

2. *Policy and Determination*

The OAG has long taken the 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) (15 U.S.C.A. § 45). During and following a public hearing on SB 848 from the 2013-14 session before the Senate Judiciary Committee on June 25, 2013, the OAG heard comments from committee members and bill opponents that the proposed legislation would be redundant to the act and that the OAG should use the act to address the unfair market trade practices. After conducting extensive legal research, the OAG agrees with the comments.

In *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, 60 (Pa.Cmwlth. 2019), the Commonwealth Court held that "the UTPCPL provides two avenues through which activities can be declared 'unfair methods of competition' or 'unfair or deceptive acts or practices.' First, the General Assembly may define a given activity as unlawful by statute in Section 2(4) of the Law. Second, the Attorney General, by virtue of Section 3.1 of the Law, may also promulgate definitions of these terms through the administrative rulemaking process. 73 P.S. § 201-3.1." The Commonwealth Court further held that "the Attorney General has thus far declined to deem [certain anticompetitive conduct] as 'unfair methods of competition' or 'unfair or deceptive acts or practices' under the UTPCPL through the administrative rulemaking process." *Id.* at 61.

Through the experience of investigation and litigation, the OAG has identified that Pennsylvanians have been disadvantaged by the lack of a clear articulation of state law that makes it easy to understand that Pennsylvanians can recover regardless of whether they have dealt directly or indirectly with the defendant or defendants for injury resulting from anti-competitive conduct. The OAG has determined that this proposed rulemaking under the act will remedy this unfair vacuum under the state law.

3. *Unfair Market Trade Practices*

The OAG has determined that the following general provisions in the Proposed Rulemaking clarifies operative terms of the act consistent with the basic policy choice expressed in Section 3 of the act (73 P.S. § 201-3). Section 311.2 (relating to definitions) provides for the definition of "unfair market trade practices," which, in turn, are defined as "unfair methods of competition and unfair or deceptive acts or practices." Subclause (i) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies intended to impose resale price maintenance restraints. Subclause (ii) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies between competitors for the purpose of price-fixing. Subclause (iii) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies between competitors to allocate markets, reduce output or allocate customers.

Subclause (iv) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies intended to tie the sale of any article of trade or commerce upon the purchase of another article of trade or commerce. Subclause (v) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies for the purpose of reciprocal dealings.

Subclause (vi) under "unfair market trade practices" prohibits all contracts, combinations and conspiracies to effectuate a group boycott. Subclause (vii) under "unfair market trade practices" prohibits actual monopolization. Subclause (viii) under "unfair market trade practices" prohibits attempted monopolization. Subclause (ix) under "unfair market trade practices" prohibits joint monopolization. Subclause (x) under "unfair market trade practices" prohibits incipient conspiracies to monopolize. For purposes of regulatory intent, an agreement among two or more persons to engage in collective bargaining does not come within the scope of this proposed rulemaking.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.3 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. Pennsylvania courts have held that Section 5 of the FTCA is virtually the same as Section 3 of the act and that Pennsylvania courts may look to decisions under the FTCA for guidance in interpreting the act. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 462, 329 A.2d 812, 818 (1974); *Pirozzi v. Penske Olds-Cadillac-GMC, Inc.*, 605 A.2d 373, 376 (Pa. Super. 1992). Pennsylvania courts have interpreted that a violation of federal or state statutes aligned with the purpose of the FTCA and the act constitutes a violation of the act since the act is "broad enough to encompass all claims of unfair and deceptive acts or practices in the conduct of any trade or commerce." *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007). Section 5(a)(1) of the FTCA provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The OAG determines that it logically follows that a violation of Section 5 of the FTCA constitutes a violation of the act because such a conclusion incontrovertibly falls within the scope of the Legislature's basic policy choice in the act that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . .are hereby declared unlawful."

In holding that the broad prohibition of section 3 of the act and the catchall is broad and flexible, the Pennsylvania Supreme Court denied the application of the doctrine of ejusdem generis on the enumerated definitions of unfair methods, acts or practices to circumscribe the statutory construction of the catchall and Section 3 of the act. The Pennsylvania Supreme Court held "[s]uch a holding would negative the Legislature's understanding that 'Fraud is infinite' and would allow the broad prohibition of section 3 to be 'eluded by new schemes which the fertility of man's invention would contrive.' See note 42 supra. This we will not do." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 827 (1974). In Note 42 incorporated by reference in the holding, the Pennsylvania Supreme Court cites with approval a federal case which held "[f]raud, indeed, in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193—94, 84 S.Ct. 275, 284 (1963). This is in accord with the FTC's standard of unfairness. *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972).

This standard was applied in *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983).

The United States Supreme Court has held that Section 5 of the FTCA protects consumers from unfair competitive practices regardless of the effect on competition unlike the federal antitrust laws. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). Rulings under the FTCA have held antitrust violations to constitute an unfair and deceptive practice. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S. Ct. 2009, 2016 (1986); *FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *FTC v. Cement Inst.*, 333 U.S. 683, 688, 68 S. Ct. 793, 797 (1948); and *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002).

The Commonwealth Court held that the OAG's UTPCPL-based antitrust claim came "within the ambit" of the catch-all. *Anadarko Petroleum Corp.* at 61. The Commonwealth Court credited the OAG's averments that defendants "deceived and acted unfairly towards private landowners by giving them misleading information, and/or failing to disclose information, regarding the open market's true appetite for subsurface mineral rights leases, as well as whether the terms of the agreed-to leases 'were competitive and fair.'" *Id.* In *Lisa Hunt v. Bayer AG*, Feb. Term 2005, No. 1038 (Phila. Comm. Pl.), the court recognized price-fixing to be a violation of the act. *In re Suboxone*, 64 F.Supp.3d 665 (E.D. Pa. 2014), the court held that anticompetitive schemes are redressable under the act. Through cases such as *Anadarko Petroleum Corp., Lisa Hunt* and *In re Suboxone*, the OAG has identified in section 311.2 of the proposed rulemaking certain "unfair market trade practices" which are deemed to be unfair methods of competition and unfair or deceptive acts or practices under the act which are necessary for the enforcement and administration of the act.

4. *Core Definitions of Unfair, Deceptive and Fraudulent Conduct*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify the general prohibition of the act and the catchall. Section 311.2 (relating to definitions) provides for the definition of "unfair methods of competition and unfair or deceptive acts or practices." Subclauses (v) and (w) under "unfair methods of competition and unfair or deceptive acts or practices" respectively defines "unfair conduct" and "deceptive conduct" as "unfair methods of competition and unfair or deceptive acts or practices" and thus codify the holdings in *Ash v. Continental Ins. Co.*, 593 Pa. 523, 530 (2007), and *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (1974), that the catchall is to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the general prohibition provision is intended to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce and that the per se violations, however enumerated, do not limit or otherwise circumscribe the basic policy choice set forth in the general prohibition provision.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the definition of "unfair methods of competition and unfair or deceptive acts or practices" under Section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. The proposed rulemaking necessarily defines the following terms: "unfair conduct," "fraudulent conduct" and "deceptive conduct" to clarify the scope of "unfair methods of competition and unfair or deceptive acts or practices" within the operation of Section 3 of the act.

First is "unfair conduct." In *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983), the court held that "[a]n act or practice need not be deceptive to be declared 'unfair.'" The court in *Nickel* looked to *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972) for guidance on what constitutes unfairness. The *Nickel* court adopted the unfairness standard: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120-121 (Mercer County C.P. 1983). Likewise in federal court construing the act, "an act or practice need not be proven to be deceptive in order to be declared "unfair"-which necessarily involves consideration of a variety of factors including whether the practice causes substantial injury to consumers or others. *Com. ex rel. Zimmerman v. Nickel*, 26 Pa. D & C 3d 115, 120 (Mercer County C.P. 1983) (citing *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972))." *Westfield Grp. v. Campisi, 2006 WL 328415, at *18 (W.D. Pa. Feb. 10, 2006).* The proposed definition for "unfair conduct" is in accord with state and federal jurisprudence.

Next is "fraudulent conduct." There are sound policy reasons for the Supreme Court's mandate that the UTPCPL is to be construed liberally. By the 1960's following the 1938 amendment of Section 5 of the FTCA which had made unfair or deceptive acts or practices ("UDAP") unlawful, it became clear that the FTC needed help from the states to combat UDAP. Compounding the FTC issue, persons with an unequal bargaining position seeking redress for UDAP faced significantly difficult hurdles that limited access to justice under the requirements of proving common law fraud.[1] *See* 1 Pa. C.S. § 1921 (c)(1), (2) and (5). Ultimately, the mischief to be remedied is unfair and deceptive market practices. *See* 1 Pa. C.S. § 1921 (c)(3). To take down the hurdle of common law fraud[2] and to move beyond the era of *caveat emptor*, many states like Pennsylvania enacted UDAP statutes to facilitate access to justice in the 1960s and 70s.

"We cannot presume that the Legislature when attempting to control unfair and deceptive practices in the conduct of trade or commerce intended to be strictly bound by common-law formalisms." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 469–70 (Pa. 1974). The UTPCPL is in a class by itself due its *sui generis* nature." *Gabriel v. O'Hara*, 368 Pa. Super. 383, 394, 534 A.2d 488, 494 (Pa. Super. Ct. 1987). "Since the Consumer Protection Law was in relevant part designed to thwart fraud in the statutory sense, it is to be construed liberally to effect its object of preventing unfair or deceptive practices." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). "The Legislature sought by the

---

[1] *See* William A. Lovett, *Louisiana Civil Code of 1808: State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 754 n.86 (1972).

[2] Original *per se* definition subclauses obviated the need to show materiality, scienter, and intention by the declarant to induce action. *Ihnat v. Pover*, 2003 WL 22319459, at *3 (Pa. Com. Pl. Aug. 4, 2003).

Consumer Protection Law to benefit the public at large by eradicating, among other things, 'unfair or deceptive' business practices." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 457 (Pa. 1974). The Supreme Court then interpreted and defined the catch-all relating to "any other fraudulent conduct" to mean "generally all unfair and deceptive acts or practices in the conduct of trade or commerce." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478 (Pa. 1974). "Rather than restricting courts and the enforcing authorities solely to narrowly specified types of unfair and deceptive practices, the Legislature wisely declared unlawful 'any other fraudulent conduct.' This is a common and well-accepted legislative response to the mischief caused by unfair and deceptive market practices." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 479 (Pa. 1974).

The Supreme Court in footnote 43 pointed to the breadth of Section 5 of the FTCA as an example of the scope of what would come within the meaning of the catch-all. *Id.* The OAG finds that "fraudulent conduct" is "unfair conduct" or conduct that has a tendency or capacity to defraud. In this context, conduct need not rise to the level of common law fraud or satisfy all common law fraud requirements to constitute "fraudulent conduct." Neither the intention to defraud nor actual fraud must be proved; rather it need only be shown that the acts and practices are capable of harming another person in an immoral, unethical, oppressive, unscrupulous or unconscionable way. The goal of the act is to thwart fraud or, in other words, to prevent fraud in its incipiency.

Next is "deceptive conduct." An act or practice is deceptive if it has a tendency or a capacity to deceive. *Com. ex rel Corbett v. Peoples Benefit Service, Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007). "Neither the intention to deceive nor actual deception must be proved; rather it need only be shown that the acts and practices are capable of being interpreted in a misleading way." *Id.* The proposed definition for "deceptive conduct" is in accord with state jurisprudence.

Thus, the OAG finds it necessary for the administration and enforcement of the act to define "unfair conduct," "fraudulent conduct" and "deceptive conduct," in line with the OAG's original arguments to the Supreme Court that the catchall "was designed to cover generally all unfair and deceptive acts or practices in the conduct of trade or commerce" to which the Supreme Court unambiguously stated, "we agree." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 478, 329 A.2d 812, 826 (1974). Moreover, the definitions are in line with the original legislative intent from 1968 "that this package gives Pennsylvania the strongest consumer-protection laws in the States," *Legislative Journal: House of Representatives*, 1968 Sess. vol. 1, no. 40, at 1231 (July 8, 1968). The Supreme Court has consistently mandated that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices. *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 460 (Pa. 1974). Because the act is a statute that must be liberally construed to effectuate its objective to prevent unfair or deceptive business practices, the definition of "unfair methods of competition and unfair or deceptive acts or practices" as provided in section 2(4) of the act should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992). In other words, for an act that must be liberally construed, a definition of a term and any enumeration therein should not be considered exhaustive. See *Blizzard v. Floyd*, 149 Pa. Commw. 503, 505-06, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992).

5. *Trade and Commerce*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify "trade and commerce" within the meaning of the act. Section 311.2 (relating to definitions) defines "trade and commerce" and codifies the holding of the Supreme Court in *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. Feb. 21, 2018), that the second definition of "trade and commerce" is "an inclusive and broader view of trade and commerce than expressed by the antecedent language." The Supreme Court further held that the second definition does not modify or qualify the first definition. *Id.* at 16. As a corollary, the first definition does not circumscribe the second definition. The Commonwealth Court followed the Supreme Court in holding that "this second clause operates as a catch-all of sorts, enabling '"trade" and "commerce"' to be defined in terms of common usage[.]" *Anadarko Petroleum Corp.* at 57.

The definition of "trade and commerce" under Section 311.2 also codifies the holding in *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004), as amended (Apr. 7, 2004), opinion amended on reconsideration, 851 A.2d 987 (Pa. Commw. Ct. 2004), that a buyer-seller relationship is not relevant in the context of the definition for trade and commerce. Except as provided by the single exclusion clearly expressed in Section 3 of the act, there is no class or classes of transactions within the for-profit or nonprofit business sphere that evades the ambit of "trade and commerce" under the act. Further, there is no textual basis under the act that a person must be a seller to be subject to liability under Section 3 of the act. As the Commonwealth Court recently held, "[t]he key phrase here is 'in the conduct,' which, when read in the full context of the language used in Section 3 of the UTPCPL, pertains to *all* '[u]nfair methods of competition and unfair or deceptive acts or practices' connected to UTPCPL-defined '"trade" or "commerce",' ***regardless of who is committing these unlawful acts***." *Anadarko Petroleum Corp.* at 58 (emphasis added).

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the "trade and commerce" definition under Section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 3 of the act. The Proposed Rulemaking resolves the longstanding tactic of defendants to confuse and conflate the limited standing provision of the private action with the broad standing provision of the OAG. Such dilatory and vexatious strategy only serves to unnecessarily tax the resources of the OAG at the expense of the public. The Supreme Court instructs "[t]here is no indication of an intent to exclude a class or classes of transactions from the ambit of the Consumer Protection Law. When the Legislature deemed it necessary to make an exception from the Law's scope, it did so in clear language." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 457 n.5, 329 A.2d 812, 815 n.5 (1974); *Culbreth v. Lawrence J.Miller, Inc.*, 328 Pa. Super. 374, 382, 477 A.2d 491, 496 (1984) (The Legislature expressly excluded certain businesses from regulation under the act).

The phrase, "which are classes of transactions without regard to any further limitation or specification as to a person" appended after the word, "distribution," in the definition of "trade and commerce" under section 311.2 is designed to be in accord with and based on the definition of trade and commerce under the act and codify the holdings of *Danganan*, *Monumental Properties* and *Culbreth*. In *Percudani*, a defendant argued that the Commonwealth failed to allege a buyer-seller relationship. The Commonwealth Court overruled the preliminary objection by illustrating the distinction between an action brought under section 9.2 of the act (73 P.S. §

201-9.2), which allows for private actions by any person "who purchases or leases goods or services primarily for personal, family or household purposes" and an action pursued by the Commonwealth under section 4 of the act (73 P.S. § 201-4), "which allows it to proceed when it has reason to believe that the Law is being or was violated." *Com. v. Percudani*, 844 A.2d 35, 48 (Pa. Commw. Ct. 2004).

6. *Rebate and Payment of Costs and Restitution*

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 4.1 of the act. Based on practical experience, the OAG has observed that the payment of rebates do not negate the harm; and, as such, rebates do not constitute a defense to the award of a permanent injunction, payment of costs and restitution, and a civil penalty. Section 311.4 (relating to restraining prohibited acts) provides that the payment of rebates does not moot the remedial purpose of the act to restrain and prevent unfair trade practices and reflects the economic reality that the payment of rebates does not reduce the amount to be restored to a person in interest under section 4.1 of the act. The OAG also finds it necessary for the administration and enforcement of the act to define "person in interest," "moneys or property, real or personal" as used in section 4.1 of the act (73 P.S. § 201-4.1) and "rebate." The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts to clarify "person in interest" within the meaning of the act. The Supreme Court held in *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 16 MAP 2017, 2018 WL 4570102, at *17 (Pa. Sept. 25, 2018) that the term, "person in interest," is broader than the statutorily-defined term, "person," and includes the Commonwealth.

7. *Direct or Indirect Recovery*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts and holdings of other jurisdictions construing law that is similar to the act to clarify "trade and commerce" further and monetary recovery under the act. The phrase, "including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure" appended at the end of the definition of "trade and commerce" under section 311.2 is designed to be in accord with and based on the definition of trade and commerce under the act and codify the holding of *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005) and *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators*, 574 A.2d 641, 645 (Pa. Super. Ct. 1990), affirmed, 605 A.2d 798 (Pa. 1992).

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that the phrase, "including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure" appended at the end of the definition of "trade and commerce" under section 311.2 of the Proposed Rulemaking is consistent with the basic policy choice expressed in sections 3 and 9.2 of the act. In *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127 (Pa. Commw. Ct. 2005), the court recognized that purchasers may recover monetarily regardless of whether the defendant or defendants were dealt with directly or indirectly. The Massachusetts Supreme Court relied on their statute's similarly worded trade and commerce definition to find that indirect recovery is provided by the language: "directly or indirectly affecting the people of this commonwealth." *Ciardi v. F. Hoffmann-La*

Roche, Ltd., 436 Mass. 53, 58, 762 N.E.2d 303, 308 (2002). New Hampshire and Washington likewise allow for indirect recovery based on the same construction. *LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.H. 88, 96, 931 A.2d 571, 578 (2007); *Blewett v. Abbott Laboratories,* 86 Wash.App. 782, 938 P.2d 842, 846 (1997), rev. denied, 133 Wash.2d 1029, 950 P.2d 475 (1998). Consequently, the Proposed Rulemaking clarifies that indirect recovery is so provided under the act.

8. *Civil Penalty*

The OAG has adopted the staff recommendation to clarify certain terms in or affecting Section 8 of the act. Section 311.7 recognizes that a payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by section 3 of this act does not bar an award of a civil penalty. Further, the payment of a rebate does not negate the finding of a willful use of an unlawful method, act or practice.

9. *Private Actions*

The OAG has adopted the staff recommendation to clarify certain terms in or affecting section 9.2 of the act. Section 311.9 provides for the coordination of claims brought by the OAG which are also brought by a private class action to avoid protracted disputes over representation which would unnecessarily tax limited public resources and frustrate the public interest.

The proposed rulemaking clarifies the meaning of the following terms, "ascertainable loss" and "as a result of," under section 9.2 of the act to comport with the plain language of the provision, the 1996 amendment and the liberal construction mandate. Regarding "ascertainable loss," under the similarly worded New Jersey private action provision at N.J. Stat. Ann. § 56:8-19, an "ascertainable loss under the CFA is one that is 'quantifiable or measurable,' not 'hypothetical or illusory.'" *D'Agostino v. Maldonado*, 216 N.J. 168, 185, 78 A.3d 527, 537 (2013). Regarding "as a result of," there is Supreme Court precedent under *Toy v. Metro. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186 (2007) and *Weinberg v. Sun Co., Inc.*, 565 Pa. 612, 777 A.2d 442 (2001) which construed the term, "as a result of," to mean or require justifiable reliance. However, these opinions apply to causes of action which accrued prior to the 1996 amendment of the act. See 1996, Dec. 4, P.L. 906 No. 146, § 1, effective in 60 days. The Third Circuit declined to read in the common law fraud reliance requirement in the language, "as a result of" in Section 9.2 of the act. "Although it is clear that the loss must follow the purchase of goods or services, the language does not compel the conclusion that the unfair or deceptive conduct must have induced the consumer to make such a purchase." *In re Smith*, 866 F.2d 576, 583 (3d Cir. 1989). The OAG agrees with the Third Circuit and recognizes the 1996 amendment. This proposed rulemaking clarifies and recognizes the abrogation of these holdings.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.9 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Section 9.2 of the act. In ascertaining legislative intent, the "General Assembly intends to favor the public interest as against any private interest." 1 Pa.C.S. § 1922 (relating to presumptions in ascertaining legislative intent). "It is axiomatic that a statute is never presumed to deprive the state of any prerogative, right or property unless the intention to do so is clearly manifest, either by express terms or necessary implication." *Hoffman v. City of*

Pittsburgh, 365 Pa. 386, 398, 75 A.2d 649, 654 (1950). The OAG determines that the limited right of private action does not empower persons to act as private attorneys general in any class action which would frustrate or otherwise undermine a parens patriae action by the OAG. A federal court has held that "in the situation where a state attorney general and a private class representative seek to represent the same class members, the parens patriae action is superior to that of a private class action." *Com. of Pa. v. Budget Fuel Co., Inc.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988).

10. *Subpoena Power*

The OAG has adopted the staff recommendation to make certain delegations and clarifications. Section 311.11 (relating to administrative) delegates certain powers and duties set forth in The Administrative Code of 1929 as supplemented by section 204(d) of the Commonwealth Attorneys Act (CAA) (71 P.S. § 732—204(d)). The OAG has determined that it is reasonable to make certain clarifications introduced by the enactment of the CAA concerning the permissibility of the direct use of documents obtained by an administrative subpoena in the enforcement of the act. Section 311.10 (relating to subpoena power) implements the inherent investigative function of enforcement to gather Documentary Material, as defined by the act, and made necessary to satisfy the "reason to believe" standing requirement under Section 4 of the act.

The OAG has adopted the following legal discussion of the staff which provides a reasonable basis that § 311.10 of the Proposed Rulemaking is consistent with the basic policy choice expressed in Sections 2 and 3.1 of the act. The OAG takes notice of the 1976 amendments to the act which deleted the very restrictive civil investigative demand authority and retained the definition of documentary material while granting the OAG rulemaking authority. A principle of statutory construction is to ascertain legislative intent and to give effect to all provisions of a statute. 1 Pa.C.S. § 1921 (relating to legislative intent controls); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. at 513; *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 524 (1980).

Sections 918 and 919 of The Administrative Code of 1929, as supplemented by section 204(d) of the CAA, authorize the OAG to issue subpoenas to investigate commercial and trade practices and to require the production of documentary material related to those practices. By reading The Administrative Code of 1929 and the act as one since both relate to protecting consumers from detrimental practices in the conduct of trade and commerce and through the application of the two sources of rulemaking authority invoked in this proposed rulemaking, the proposed rulemaking gives effect to the retained definition which is used nowhere else within the act. 1 Pa.C.S. § 1932 (relating to statutes in pari materia); *Com., Dept. of Environmental Resources v. Butler County Mushroom Farm*, 499 Pa. 509, 517-20 (1982); *Girard School District v. Pittenger*, 481 Pa. 91, 100 (1978).

11. *Interpretation*

The OAG has determined that it is reasonable and necessary to codify certain holdings of Pennsylvania courts. Section 311.11 (relating to interpretation) provides that the act is to be liberally construed and that the new definitions of what constitutes unlawful conduct enlarges upon existing definitions. The proposed rulemaking codifies the Supreme Court mandate that the act is to be liberally construed to effect its object of preventing unfair or deceptive practices.

Com., by Creamer v. Monumental Properties, Inc., 459 Pa. 450, 460 (Pa. 1974). Further, the Supreme Court denied the application of the doctrine of ejusdem generis on the enumerated definitions of unfair methods, acts or practices to circumscribe the statutory construction of the catchall and Section 3 of the act. The Pennsylvania Supreme Court held "[s]uch a holding would negative the Legislature's understanding that 'Fraud is infinite' and would allow the broad prohibition of section 3 to be 'eluded by new schemes which the fertility of man's invention would contrive.' See note 42 supra. This we will not do." *Com., by Creamer v. Monumental Properties, Inc.*, 459 Pa. 450, 480, 329 A.2d 812, 827 (1974). Because the intent of the proposed rulemaking is to enlarge the definition of what constitutes a method, act or practice in violation of the act, the proposed rulemaking is not to be interpreted to limit what methods, acts or practices may be considered to violate the act.

12. *Basic Policy Choice*

"The operative provision of the Unfair Trade Practices and Consumer Protection Law provides: 'Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . .are hereby declared unlawful.'" 73 P.S. § 201-3 (emphasis added). *Gabriel v. O'Hara*, 368 Pa. Super. 383, 391, 534 A.2d 488, 492 (1987). The operative provision of the act provides the Legislature's basic policy choice which guides the OAG's proposed rulemaking. The OAG proposes that Chapter 301 be amended and Chapter 311 be added to read as set forth in Annex A.

F. *Paperwork*

Generally, the proposed rulemaking will not increase paperwork and will not create new paperwork requirements. The proposed rulemaking will have a de minimus impact on paperwork for class action representatives purporting to settle and release OAG claims under the act.

G. *Benefits, Costs and Compliance*

Through this proposed rulemaking, consumers will be further protected from unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce by unscrupulous businesses. The clear articulation of this unfair trade practices regulation will make the regulation easier to understand by the public and will facilitate compliance.

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The proposed rulemaking will impose no new costs on the private sector or the general public.

H. *Sunset Review*

The OAG is not establishing a sunset date for these regulations because they are needed for the OAG to carry out its statutory authority and because the OAG will periodically review these regulations for their effectiveness.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 45.5(a)), on August ___, 2019,

the OAG submitted a copy of this Proposed Rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Judiciary Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the OAG, the General Assembly and the Governor.

J. *Public Comments*

Interested persons are invited to submit written comments, objections or suggestions about this Proposed Rulemaking to the Antitrust Section, Office of Attorney General, Strawberry Square, 14th Floor, Harrisburg, PA 17120 within 30 days after publication of this Proposed Rulemaking in the *Pennsylvania Bulletin*. Comments submitted by facsimile will not be accepted. A public hearing occurred on September 11, 2018 pursuant to Section 3.1 of the act.

Comments also may be submitted by e-mail to antitrust@attorneygeneral.gov. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt. Electronic comments submitted in any other manner will not be accepted.

JOSH SHAPIRO,

Attorney General

Annex A
TITLE 37. LAW

PART V. [BUREAU OF CONSUMER PROTECTION]UNFAIR TRADE PRACTICES

CHAPTER 311. UNFAIR MARKET TRADE PRACTICES

§ 311.1. Scope.

This chapter establishes what are determined to be unfair methods of competition and unfair or deceptive acts or practices by any person engaged in trade or commerce, but may not be interpreted to limit the power of the Attorney General to determine that another practice is unlawful under the Unfair Trade Practices and Consumer Protection Law (73 P.S.
§§ 201-1—201-9.3).

§ 311.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

Act—Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1—201-9.3).

Advertising—means any marketing communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.

Article of trade or commerce—any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate.

As a result of—Cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.

Ascertainable loss—Any loss which is quantifiable but not speculative.

Communication—Every manner or means of disclosure, transfer or exchange, and every disclosure, transfer or exchange of ideas or information, whether orally, by document, or electronically, or whether face to face, by telephone, mail, personal delivery, electronic transmission or otherwise.

Deceptive conduct—A method, act or practice which has the capacity or tendency to deceive.

Documentary material—means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

Internet service provider—means a person who furnishes a service that enables users to access content, information, electronic mail or other services offered over the Internet, and access to proprietary content, information and other services as part of a package of services offered to consumers.

Fraudulent conduct—means unfair conduct or any other conduct which has a tendency or capacity to defraud.

Market structure—Of or relating to the interrelationship of sellers and buyers at all levels of distribution of an article of trade or commerce including, but not limited to, manufacturers, suppliers, distributors, wholesalers, retailers and end users.

Marketing communication—Any communication which includes any promoting, selling or distributing of an article of trade or commerce.

Moneys or property, real or personal—means something of value including, but not limited to, restitution, disgorgement, attorneys' fees, expert fees, investigation and litigation costs, and court costs.

Person—means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

Person in interest—means a person, the Commonwealth, a Commonwealth agency, municipal authority or political subdivision whose right, claim, title or legal share in something was affected by conduct enjoined under the act.

Rebate—Partial refund of the cost of an article of trade or commerce to incentivize the sale of that article of trade or commerce.

Representing—means any communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.

Sale—means selling, buying or engaging in any other similar activity involving any article of trade or commerce.

Tangible document or recording—The original or any copy of any designated documents, including, but not limited to, writings, drawings, graphs, charts, photographs, electronically created data and other compilations of data.

Trade and *commerce*—mean the advertising, offering for sale, sale or distribution, which are classes of transactions without regard to any further limitation or specification as to a person, of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth, including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure.

Transaction—Exchange or transfer of any article of trade or commerce.

Unfair conduct—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.

Unfair market trade practices—means any one or more of the following:

(i) A contract, combination or conspiracy between two or more persons at different levels of market structure to fix minimum prices for any article of trade or commerce at one or more levels of market structure;

(ii) A contract, combination or conspiracy between two or more persons at the same level of market structure to fix or otherwise stabilize prices for any article of trade or commerce;

(iii) A contract, combination or conspiracy between two or more persons at the same level of market structure to allocate marketing territories, to reduce output of any article of trade or commerce or to allocate customers to whom any article of trade or commerce is, has been or will be marketed;

(iv) A contract, combination or conspiracy between 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;

(v) A contract, combination or conspiracy between two or more persons where the sale of an article of trade or commerce is conditioned upon the seller's purchase of any other article of trade or commerce produced or performed by the buyer;

(vi) A contract, combination or conspiracy between two or more persons at the same or different level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person;

(vii) Actual monopolization, in which a person acquires or retains actual monopoly power through competitively unreasonable practices;

(viii) Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved;

(ix) Joint monopolization, in which two or more persons conspire to jointly retain or acquire monopoly power, where actual monopoly power is achieved through competitively unreasonable practices; and

(x) Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved.

Unfair methods of competition and *unfair or deceptive acts or practices*—mean any one or more of the following:

(a) Passing off goods or services as those of another;

(b) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(c) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(d) Using deceptive representations or designations of geographic origin in connection with goods or services;

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(f) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(g) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparaging the goods, services or business of another by false or misleading representation of fact;

(i) Advertising goods or services with intent not to sell them as advertised;

(j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(l) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(m) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or

anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(n) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;

(o) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(p) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(q) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:

(A) the identity of the seller;

(B) that the purpose of the call is to sell goods or services;

(C) the nature of the goods or services; and

(D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;

(r) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;

(s) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(A) within that time clearly and conspicuously stated in any such solicitation; or

(B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time

the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;

(t) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:

(A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;

(B) that the new motor vehicle has been rustproofed by the manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect on any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(u) Unfair market trade practices

(v) Unfair conduct;

(w) Deceptive conduct; and

(x) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

§ 311.3. Unlawful acts or practices; exclusions.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. The provisions of this chapter shall not apply to any owner, agent or employe of any radio or television station, or to any owner, publisher, printer, agent or employe of an Internet service provider or a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§ 311.4. Restraining prohibited acts.

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by Section 311.3 to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The payment of a 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 this chapter.

§ 311.5. Payment of costs and restitution.

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in Section 311.4, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§ 311.6. Assurances of voluntary compliance.

In the administration of this act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of this chapter from any person who has engaged or was about to engage in such method, act or practice. Such assurance may include a stipulation for voluntary payment by the alleged violator providing for the restitution by the alleged violator to consumers, of money, property or other things received from them in connection with a violation of this act. Any such assurance shall be in writing and be filed with the court. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest, pursuant to Section 311.4.

§ 311.7. Civil penalties.

(a) Any person who violates the terms of an injunction issued under Section 311.4 or any of the terms of an assurance of voluntary compliance duly filed in court under Section 311.6 shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued; and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under Section 311.4, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by Section 311.3, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under Section 311.4 and 311.5. Where the victim of the wilful use of a method, act or practice declared unlawful by Section 311.3 is sixty years of age or older, the civil penalty shall not exceed three thousand dollars ($3,000) per violation, which penalty shall be in addition to other relief which may be granted under Sections 311.2 and 311.5. A payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by Section 311.3 does not bar an award of a civil penalty.

§ 311.8. Forfeiture of franchise or right to do business; appointment of receiver.

Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under Section 311.4. In addition, the court may appoint a receiver of the assets of the company.

§ 311.9. Private actions.

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by Section 311.3, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

(b) Any permanent injunction, judgment or order of the court made under Section 311.4 shall be prima facie evidence in an action brought under this Section that the defendant used or employed acts or practices declared unlawful by Section 311.3.

(c) A person may not settle and release any claim under the act as part of a class action in any court of competent jurisdiction without first providing notice to and receiving written consent from the Office of Attorney General.

(d) Except as provided by 71 P.S. § 732-103 (relating to standing to question legal representation), no person has standing to question the authority of the legal representation of the Commonwealth and its citizens where the Office of Attorney General has not granted consent or has transmitted a written revocation of such consent under Section 311.9(c).

§ 311.10. Subpoena power.

(a) The Attorney General shall be authorized to require the attendance and testimony of witnesses and the production of any books, accounts, papers, records, documents, and files relating to any commercial and trade practices to the extent authorized by 71 P.S. § 307-2 (relating to the powers and duties of the Bureau of Consumer Protection) as amended by 71 P.S. § 732-204(d) (relating to the administration of consumer affairs program) under this chapter and conduct private or public hearings; and, for this purpose, the Attorney General or his representative may sign subpoenas, administer oaths or affirmations, examine witnesses and receive evidence during any such investigation or public or private hearing. In case of disobedience of any subpoena or the contumacy of any witness appearing before the Attorney General or his representative, the Attorney General or his representative may invoke the aid of the Commonwealth Court or any court of record of the Commonwealth, and such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents and files relative to the

matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) No documentary material produced pursuant to a demand under this section shall, unless otherwise ordered by a court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to any person other than the authorized employe of the Attorney General without the consent of the person who produced such material: Provided, That under such reasonable terms and conditions as the Attorney General shall prescribe, such documentary material shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person. The Attorney General or any attorney designated by him may use such documentary material or copies thereof as he determines necessary in the enforcement of this act, including presentation before any court: provided, that any such material which contains trade secrets or other highly confidential matter shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material.

§ 311.11. Interpretation.

(a) This chapter shall be liberally construed to effectuate its objective of protecting the public of this Commonwealth from fraud and unfair or deceptive business practices.

(b) The catchall provision contained in Subsection (x) of the definition of "Unfair methods of competition and unfair or deceptive acts or practices" in Section 311.2 shall not be restricted by the subsections enumerated before it. Instead, it shall be construed as designed to generally cover all unfair or deceptive acts or practices in the conduct of trade or commerce.

§ 311.12. Waiver of rights.

A waiver of this chapter by any person prior to or at the time of a commission of a violation of Section 311.3 or any other section of this chapter is contrary to public policy and is void. An attempt by any person to have another waive his rights under this chapter shall be deemed to be a violation of the Act.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

August 21, 2019

ANTITRUST SECTION
14th Floor, Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-4530
Fax: (717) 787-1190

Mr. David Sumner, Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17101

RE: Proposed Regulation Package 59-10: Unfair Market Trade Practices

Dear David:

The Office of Attorney General (OAG) is submitting a proposed new chapter 311 to its regulations under 37 Pa. Code. Enclosed please find a copy of the regulatory analysis form, signed CDL-1 face sheet, preamble and Annex A (regulatory text). The OAG approved this proposed rulemaking for form and legality.

This proposed rulemaking is being delivered today to the legislative standing committees and the Legislative Reference Bureau.

If you have any questions or comments about this regulatory submission, please do not hesitate to contact me or Joseph Betsko, Senior Deputy Attorney General, Antitrust Section at (717) 787-4530.

Very truly yours,

Tracy W. Wertz
Chief Deputy Attorney General

cc with enclosures:

Honorable Lisa M. Baker, Majority Chair, Senate Judiciary Committee
Honorable Lawrence M. Farnese, Jr., Minority Chair, Senate Judiciary Committee
Honorable Rob M. Kauffman, Majority Chair, House Judiciary Committee
Honorable Tim Briggs, Minority Chair, House Judiciary Committee
Mike Vereb, Director of Government Affairs, Office of Attorney General
Amy Elliott, Chief Deputy Attorney General, Legal Review, Office of Attorney General

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 59-10

SUBJECT: Unfair Market Trade Practices

AGENCY: Office of Attorney General

RECEIVED
IRRC
2019 AUG 21 A 10:33

TYPE OF REGULATION

(X) **Proposed Regulation**

( ) **Final Regulation**

( ) **Final Regulation with Notice of Proposed Rulemaking Omitted**

( ) **120-day Emergency Certification of the Attorney General**

( ) **120-day Emergency Certification of the Governor**

( ) **Delivery of Tolled Regulation**
( ) **With Revisions** ( ) **Without Revisions**

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
		HOUSE COMMITTEE - Judiciary
8.21.19	Elaine Maynard	**MAJORITY CHAIR** Rob M. Kauffman
8/21/19	[signature]	**MINORITY CHAIR** Tim Briggs
		SENATE COMMITTEE - Judiciary
8/21/19	Liz Clancy	**MAJORITY CHAIR** Lisa Baker
8/21/19	[signature]	**MINORITY CHAIR** Lawrence M. Farnese, Jr.
8/21/19	Stephen E. Hoffman	**INDEPENDENT REGULATORY REVIEW COMISSION**
		ATTORNEY GENERAL (for Final Omitted only)
8/21/19	Cousins Grant	**LEGISLATIVE REFERENCE BUREAU (for Proposed only)**

Tab “B”

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.

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s George A. Bibikos
George A. Bibikos

January 9, 2020

WORD-COUNT CERTIFICATION

In accordance with Pa.R.A.P. 531(b)(3), I certify that the attached contains 6,801 words, excluding the portions identified in the rules that do not count towards the word limitation, as calculated by the word-count feature of Microsoft Word.

/s George A. Bibikos
George A. Bibikos

January 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served on counsel of record for the parties and *amici* via PACFile, which service satisfies the requirements of Pa.R.A.P. 121.

/s George A. Bibikos
George A. Bibikos

Counsel for the Associations