The Potential Business Risks of Expanding New York's Antitrust Laws Under the "Twenty-First Century Antitrust Act"

By Rosa M. Morales

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While multiple antitrust bills introduced in Congress have gotten more press attention, the reality is that proposed state legislation pending in New York appears more likely to be enacted into law. And those sweeping reforms would have broad impact on businesses based well beyond New York's borders. Last June, the New York Senate passed the "Twenty-First Century Antitrust Act,"[1] which is legislation that aims to reverse the power of "large corporations" that "abuse" their "dominant position," establish an unprecedented state-level premerger filing regime that would capture deals well below federal thresholds, and ban a broad range of labor practices many states find lawful. After failing to pass the Democratic-led New York State Assembly in the prior session, the Act was reintroduced in January 2022, and, at the time of publication, had made its way out of the Senate Consumer Protection Committee and is on the floor calendar for a Senate and Assembly vote. Should the bill become law, the Act would usher in a new era of aggressive state regulation of competitive behavior.

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The pending legislation is notable on various fronts. For example, the proposed Act rejects more than a century of judicial precedent and enforcement regarding the burden of proof for establishing monopoly power. It also removes a firm's ability to proffer procompetitive justifications to overcome an "abuse of dominance" claim, which is a new statutory standard for illegal single-firm conduct that is borrowed from European law with no precedent in U.S. antitrust jurisprudence. And while born out of a stated "great concern for the growing accumulation of power in the hands of large corporations,"[2] particularly in the technology sector,[3] the legislation paints with a much broader stroke, covering firms across all sectors in New York's economy. Indeed, the Act's breadth may overhaul the State's antitrust laws in ways that have potential reverberations across the rest of the country. Unsurprisingly, the bill has generated substantial opposition primarily from business groups concerned about risks of over-regulation and other unintended consequences.

I. Key Provisions in the "Twenty-First Century Antitrust Act"

a. The Act's European-style "abuse of dominance" standard lowers evidentiary thresholds and permits treble damages class actions. Unlike the federal Sherman Act, the Donnelly Act, the State's antitrust law (codified under General Business Law § 340), does not today reach

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1 S.B. 933A, 2021 State S., 2021–2022 Leg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/s933.

2 S.B. 933A, § 2.

3 Senator Gianaris remarked: "We have a problem in this country. We have a problem that there is tremendous market power in very, very few hands . . .. Small startups and medium-sized businesses don't have the opportunity to grow and innovate." Ryan Tracy, *New York Senate Passes Antitrust Bill Targeting Tech Giants*, WALL ST. J. (June 7, 2021), https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225.

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unilateral business conduct, but instead focuses solely on concerted behavior.[4] In other words, there is no analog under the current New York statute to Section 2 of the Sherman Act, which bans certain single-firm behavior under federal law when used in support of the unlawful acquisition or maintenance of monopoly power.[5] But the proposed New York legislation would make monopolization, attempted monopolization, and conspiracy to monopolize violations under the State's antitrust laws, using a standard that departs significantly from federal law.[6]

Unlike its federal and sister-state counterparts, the New York legislation would adopt a European-style "abuse of dominance" standard that would potentially cover single-firm conduct long considered lawful (and even procompetitive), while eliminating key efficiency defenses typically available under U.S. law.[7] In particular, the Act would establish a "dominant position" standard and would prohibit unilateral conduct by firms that "abuse" such a "dominant" position.[8] The adoption of this European standard provides several distinctive features to the Act that lower evidentiary standards for showing an antitrust violation and increase the risk of private class actions with treble damages recovery, which is currently not available under New York law but would be created by the proposed changes.[9]

The Act's "abuse of dominance" variant also seems harsher than its European counterpart in various respects. For example, in contrast to European law, where a firm with relatively modest market share could be deemed dominant if high entry barriers exist or no other large players are in the market, the New York legislation creates a presumption of dominance with a relatively low market share of at least 40% for sellers and at least 30% for buyers regardless of market dynamics.[10] These relatively low shares stand in contrast to the much higher thresholds required for

4 N.Y. Gen. Bus. Law § 340. The Donnelly Act explicitly prohibits price fixing, bid rigging, market allocation, group boycotts, and tying.

5 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court").

6 S.B. 933A, § 340(2)(a).

7 Article 82 of the Treaty establishing the European Economic Community, and now Article 102 of the Treaty on the Functioning of the European Union (TFEU), includes "abuse of dominance" as a violation.

8 Under the Act, "abuse of a dominant position may include, but is not limited to, conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as . . . refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors." S.B. 933A, § 340 (2)(b)(ii).

9 *See, e.g.*, Commonwealth Elec. Inspection Servs, Inc. v. Town of Clarence, 776 N.Y.S.2d 687 (App. Div. 2004) (rejecting GBL § 340 challenge to municipal ordinance because it was purely unilateral and thus not accomplished through a proscribed contract, agreement, arrangement, or combination); Hall Heating Co., Inc. v. New York State Elec. and Gas Corp., 580 N.Y.S.2d 528, 529 (App. Div. 1992) ("Unilateral action is insufficient to support a claimed violation of GBL 340"); Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 710 F.2d 87, 90 (2d Cir. 1983) ("The New York courts have interpreted the Donnelly Act to require the existence of a 'reciprocal relationship of commitment between two or more legal or economic entities' before liability may be found") (quoting State v. Mobil Oil Corp., 381 N.Y.S.2d 426, 428 (App. Div. 1976)).

10 S.B. 933A, § 340 (2)(b)(i)(2).

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monopolization claims under federal law,[11] and such low shares may serve as "indirect evidence" of a firm's "dominant position" in the "relevant market."[12]

But the Act does not distinguish between unlawful/anticompetitive and lawful/procompetitive acquisitions of monopoly power. For example, the Act does not consider how a firm may have achieved a 40% share, including, for example, whether it is the result of better products or services offered to consumers, or because of a "first mover" advantage.[13] Indeed, the Supreme Court has long recognized that monopoly power may be the result of "growth or development as a consequence of a superior product, business acumen, or historic accident."[14] And given that antitrust markets can be—and often are— defined very narrowly, even to the level of a single product, such low thresholds for showing dominance conceivably could easily be met under the Act and could discourage aggressive competition that would ultimately benefit consumers. One critic pointed out that the combination of lack of clear guidance on what constitutes abuse and relatively low market share thresholds for establishing dominance could have the unintended consequence of chilling innovation for "entirely new class[es] of product[s] and pioneering . . . new type[s] of market[s]" for fear of the stiff penalties, including criminal liability, that may accompany a finding of abuse of dominance, as further discussed below.[15]

Notably, the Act leaves what constitutes an "abuse of a dominant position" largely undefined, thereby infusing uncertainty for businesses as to what would be considered lawful or unlawful business behavior. For example, the Act currently provides that "[i]t shall be unlawful for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position."[16] With the exception of minimum thresholds that the Act considers "indirect evidence" of dominance,

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[11] For example, the U.S. Supreme Court has held that no monopoly power could exist on a market share of less than 50 percent. *See* United States v. United States Steel Corp., 251 U.S. 417, 444 (1920) ("The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them ... monopoly, therefore, was not achieved ..."). And while the exact monopolization threshold has not been fixed since *U.S. Steel*, many circuits have found a market share of under 70 percent to be insufficient for establishing monopoly power for a Section 2 monopolization claim. *See* Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992) (55 percent share insufficient); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F.Supp.2d 362 (M.D.N.C. 2002), *aff'd sub nom.* 67 F. App›x 810 (4th Cir. 2003) (51.3 percent share insufficient); Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33 (7th Cir. 1976) ("Even if plaintiff had properly defined a relevant market, [it would not prevail because] it failed to prove that Produce Terminal had a dominant share exceeding 60 percent of the market."); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974, 974 n. 6 (8th Cir. 1968) (noting that "a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition" and citing nine monopolization cases in which the market share ranged from 70 to 90 percent); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 694 n. 18 (10th Cir. 1989), (citing 2 E. Kintner, *Federal Antitrust Law* § 12.6 (1980) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70 percent and 80 percent.")).

[12] S.B. 933A, § 340 (2)(b)(i)(2).

[13] In their testimony to New York legislators, two critics argued that the "abuse of dominant position" provisions of the Act would "have a chilling effect on common business activities that provide substantial benefit to consumers." For example, they noted, "first to market innovators, such as a small, emerging pharmaceutical firm with a breakthrough treatment technology," could be subject to a third-party claim that it "has both a dominant market position (as both the specific market, and the share of that market that constitutes dominance can be defined by the plaintiff), and is abusing that power though its pricing practices (again, with 'abuse' being left to a plaintiff to define.)" Ken Pokalsky, President, and Lev Ginsburg, Senior Direct, Government Affairs, The Business Council, Testimony to New York State Senate Standing Committee on Consumer Protection, "The Twenty-First Century Antitrust Act (S.8700)," Sept. 14, 2020 (Albany, NY) at 3.

[14] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[15] TechNet, Memorandum in Opposition Re: S8700, submitted to the State Standing Committee on Consumer Protection of the Legislature of the State of New York on The Twenty-First Century Antitrust Act (S.8700-A), Sept. 14, 2020 (Albany, NY).

[16] S.B. 933A, § 340 (2)(b)(ii).

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as discussed above, the Act provides nothing more by way of elaboration regarding the types of conduct that may be considered "abusive." By contrast, Article 102 TFEU (formerly, Article 82 TEC) provides a non-exhaustive list of the kinds of behavior that may be considered an abuse of a dominant position. And although the list leaves room for interpretation, Article 102 TFEU provides a measure of guidance to businesses seeking to avoid unlawful business conduct, including:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets, or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[17]

Faced with a lack of regulatory and judicial guidance, the Act would leave firms located in or conducting business in New York in the dark about what would constitute legitimate market behavior under the new statutory framework. Instead, the New York Attorney General is given the responsibility to promulgate rules to shape the standard over time.[18]

Critically, the New York legislation also would broaden the European "abuse of dominance" standard by covering "any conduct that tends to . . . limit the . . . incentive of one or more actual or potential competitors to compete" while precluding firms from rebutting abuse of dominance claims through a showing of "evidence of pro-competitive effects" that "offset or cure competitive harm."[19] By contrast, European law allows firms to show that their conduct was "objectively justified" by a legitimate business purpose.[20] By eliminating the ability of firms to show procompetitive justifications that may offset the effects of conduct alleged to constitute an abuse, the New York legislation effectively treats as *per se* violations many procompetitive business arrangements by "dominant" firms, such as aggressive price discounting and bundling, that may result in lower prices and other benefits for consumers. This is directly at odds with federal law where *per se*

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17 Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) 47.

18 Recognizing the lack of guidance on the types of behavior constituting "abuse of dominant position" in an earlier Assembly version of the legislation, Jay L. Himes, former Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York and early supporter of the Act, recommended as follows:

> Modeling the categories [in the New York Act] on those in Article 102 would facilitate resort to European law and commentary to inform federal and state court consideration of the Donnelly Act claim, as well as assist antitrust practitioners in counselling clients on compliance with the State's new law. Through judicial decisions, a body of Donnelly Act abuse of dominance law would develop, and these rulings would themselves aid the New York Legislature in evaluating whether to enact additional statutory refinement of the claim.

Written Testimony of Jay L. Himes before the State Standing Committee on Consumer Protection of the Legislature of the State of New York on The Twenty-First Century Antitrust Act (S.8700-A), Sept. 14, 2020 (Albany, NY) at 7-8 (hereinafter, "Himes Testimony"). This language in the earlier version remains largely intact in the Act's current configuration.

19 S.B. 933A, § 340 (2)(b)(iii).

20 *Post Danmark A/S v Konkurrencerådet* (n 29), Opinion of Advocate General Mengozzi delivered on 24 May 2011, para 52, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CC0209#t-ECR_62010CC0209_EN_01-E0029: "[T]hose interested parties ['FK, the Danish and Italian Governments, the EFTA Surveillance Authority and, to a certain extent, the Commission'] submit that, irrespective of costs, selective pricing by a dominant undertaking in relation to customers of its only genuine competitor leads, or may very likely lead, to the exclusion of the latter if such pricing is not justified on economic grounds, particularly economies of scale. That is said to be the situation in the main proceedings." *See also* Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi [2011] ECR I-9419, para. 39, where the Court refers to agreements with an "objective justification." https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0439.

illegality is typically reserved for collusive conduct under Section 1 of the Sherman Act, such as price-fixing, bid-rigging, market allocation, and other types of anticompetitive agreements among competitors, which are considered the "supreme evil of antitrust."[21]

Another notable aspect of the Act is its provision regarding labor markets. The New York legislation would treat as direct evidence of "abuse of dominance" a firm's "use of non-compete clauses or no-poach agreements," as well as the ability of a firm to "impos[e] contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or restricting the freedom of workers and independent contractors to disclose wage and benefit information."[22] As do many states, New York law currently permits use of non-compete agreements that are reasonably tailored and necessary to protect an employer's legitimate business interests without unduly harming the employee or public.[23] But despite the fact that firms with no market power in labor markets routinely use non-compete clauses to protect their trade secrets and intellectual property, for example, in a joint venture or sale of a business, the Act could be read as effectively banning *all* non-competes as *per se* illegal in New York. Such a wholesale ban may inadvertently discourage parties from entering into procompetitive joint ventures that can create efficiencies and economies of scale, lower costs, produce new or higher-quality products, and accelerate innovation if they cannot protect against unfair competition by business partners. The Act may also discourage the employment of new hires for fear that firms will be rendered unable to protect themselves from the new employees' subsequent unrestricted use of the firm's know-how and trade secrets.

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In another significant departure from current New York antitrust law, the proposed Act would align itself with federal and other states' laws by authorizing antitrust class action lawsuits and recovery of treble damages "in relation to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade."[24] The Donnelly Act does not currently allow recovery of treble damages in *class* actions for antitrust violations.[25] Compounded by a lower liability standard for establishing dominance and its "abuse" of that position, the bill has raised concerns in the business community, which fears opportunism and an onslaught of unnecessary class actions that

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[21] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

[22] S.B. 933A, § 340 (2)(b)(ii).

[23] *Non-Compete Agreements in New York State, Frequently Asked Questions*, N.Y. STATE ATT'Y GEN., https://ag.ny.gov/sites/default/files/non-competes.pdf; *see also* S.734, 2021-2022 N.Y. Leg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/s734. Other states, like California, take a more measured approach to balance the state's policy favoring competition, *see* Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008), and non-competes in the labor context. California's Business and Professions Code Section 16600, states that, with a few exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16601. But even though Section 16600 may invalidate most agreements restricting competition, it nonetheless provides some exceptions to rule by allowing the use of reasonably tailored non-competes to protect trade secrets, in transactions involving the sale or dissolution of partnerships, and to protect a company's goodwill. Id. §§ 16601-02.5. The Act, at least on its face, does not provide for such exceptions.

[24] S.B. 933A (preamble).

[25] In *Sperry v. Crompton*, 8 N.Y.3d 204 (N.Y. 2007), the New York Court of Appeals decision held that New York CPLR 901(b) forecloses Donnelly Act *class* actions for treble damages. The Donnelly Act's damages provision states that "any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby." N.Y. Gen. Bus. Law § 340(5) (McKinney 2004). CPLR 901(b) provides that: "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." N.Y. C.P.L.R. § 901(b) (McKinney 2005). But because nothing in the Donnelly Act provision expressly authorizes class actions, § 901(b) prohibits such actions. The *Sperry* court therefore held that "Donnelly Act threefold damages should be regarded as a penalty insofar as *class actions* are concerned." 8 N.Y.3d at 214 (emphasis added).

The provision also potentially widens the scope of criminal liability for firms with high market shares—even where they acquired such shares by offering a superior product or a market has been so narrowly defined to artificially increase their market share.

may ultimately hurt smaller firms and consumers and discourage economic growth and entrepreneurialism.[26] While the New York bill relies on a European-style "abuse of dominance" standard, it differs in significant ways from European practice, which does not have an equivalent system of private rights as the United States, including treble damages, recovery of attorneys' fees to the prevailing plaintiff, class actions, broad discovery, and jury trials. Indeed, the U.S. standard has been tightened over time to account for these features of our system. And while the European substantive standard might look attractive from a distance, its lower standards are not a good fit for the U.S. system and could over-incentivize less worthy claims.

b. The Act criminalizes monopolization under a vague standard that appears to cover common and procompetitive business activity. The proposed legislation not only adds a new civil violation for unilateral conduct that would prohibit the unlawful acquisition or maintenance of a dominant position, it adds criminal penalties for violations of up $100 million for corporations and $1 million for individuals, as well as up to four years' imprisonment.[27] The provision also potentially widens the scope of criminal liability for firms with high market shares—even where they acquired such shares by offering a superior product or a market has been so narrowly defined to artificially increase their market share, *e.g.*, "entry-level on-premises sparkling wine."[28]

While criminal liability for unilateral antitrust violations is available under federal law, the Department of Justice's Antitrust Division historically has refrained from criminally prosecuting Section 2 violations under the Sherman Act.[29] The New York bill fails to distinguish between unilateral and multi-firm conduct for purposes of criminal liability by treating monopolization on par with price-fixing, bid rigging, and market allocation. But given the Act's lack of detail on what constitutes an abuse of a "dominant position" and the relatively low thresholds for establishing dominance, criminalizing unilateral conduct may seem particularly punitive. That is especially of concern when, as the Supreme Court has recognized, the "opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[30] Potentially facing hefty fines and jail time for engaging in competitive conduct may have the opposite effect of deterring—rather than spurring—vigorous competition.

The Act delegates to the New York Attorney General the responsibility for interpreting and enforcing the new antitrust law, which critics fear would give the office an outsized role in regulating the State's commerce[31] without providing sufficient clarity about what conduct is illegal under the new regime or ensuring the office would have the sufficient resources to do so effectively.

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[26] Ryan Tracy, *New York Senate Passes Antitrust Bill Targeting Tech Giants*, Wall St. J. (June 7, 2021), https://www.wsj.com/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225.

[27] S.B. 933A, § 341.

[28] Complaint, E. & J. Gallo Winery, Dkt. No-C-4730, File No. 191-0110, (Apr. 5, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0110-e-j-gallo-wineryconstellation-brands-matter.

[29] On March 2, 2022, the DOJ's Antitrust Division Deputy Assistant Attorney General Richard Powers announced that the Division intends to criminally enforce violation of Section 2 of the Sherman Act., which is a significant expansion of its criminal enforcement program and departure from its long-standing policy to prosecute criminally only *per se* anticompetitive agreements (i.e., price fixing, output restriction or market allocation) among horizontal competitors under Section 1. For decades, Section 2 enforcement has been confined to civil actions for monopolization or anticompetitive exercise of monopoly power.

[30] *Trinko*, 540 U.S. at 407.

[31] For example, the Act states provides that the "attorney general shall issue guidance on how it will interpret market shares and other relevant market conditions to achieve the purposes of paragraph (b) of this subdivision while taking into account the important role of small and medium-sized businesses in the state's economy." S.B. 933A, § 340 (2)(c)(i).

The Act would also establish an unprecedented new state-level premerger notification requirement with much lower dollar thresholds than those currently applicable under the federal Hart-Scott-Rodino Antitrust Improvements Act ("HSR").

Indeed, even supporters of the Act have warned that one of the disadvantages of leaving it up to the New York Attorney General to fill in the gaps of the Act is the "risk of 'mission creep,'" whereby the regulator "decided or was persuaded to develop an increasingly intricate 'code of conduct,'"[32] potentially further obscuring the boundaries between lawful and unlawful activity. Another risk is the onslaught of "stakeholder court challenges to both the procedural and substantive aspects of the regulatory effort [that] would probably delay the new law's taking effect, or even produce its death by a thousand cuts."[33] But while issuing "guidelines" might mitigate such concerns, they would not be binding on courts so would still leave businesses at risk in trying to comply.

c. The proposed 60-day premerger notification requirement captures many transactions that fall below the federal threshold. The Act would also establish an unprecedented new state-level premerger notification requirement[34] with much lower dollar thresholds than those currently applicable under the federal Hart-Scott-Rodino Antitrust Improvements Act ("HSR").[35] The bill requires little to no connection to New York, and would require premerger notification to the New York State Attorney General in nearly all industries for transactions that (i) would result in the acquirer holding voting securities or assets of the acquired person of more than 10% of the federal HSR threshold—which is currently $101 million, and (ii) where one of the parties has annual net sales or total assets within the state of more than 2.5% of the federal HSR threshold (or approximately $10 million),[36] with a few exceptions.[37] Notification must be made 60 days before the deal's closing, doubling the waiting period of 30 days under the federal HSR premerger filing system. For HSR-reportable transactions, the Act would require that parties provide copies of their HSR filings to the Attorney General,[38] but it does not impose on the parties any waiting period before they can consummate the deal even if the New York Attorney General has launched an investigation.

Given the low filing thresholds, many procompetitive transactions that are not HSR-reportable would be captured by the Act, risking potential delay and increased cost for many small and medium-sized businesses and startups that would seek to avoid the $10,000-a-day civil penalties they may face for failing to comply.[39] One key question is whether the Attorney General has the resources to review what could be thousands of largely competitively benign (and even beneficial)

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32 Himes Testimony, *supra* note 18, at 8.

33 *Id.*

34 At the time of this publication, two Florida bills are pending—HB 705 and SB 1112—that would require premerger notification of HSR-reportable deals. The Florida legislative proposals would both require "[a]ny entity conducting business in the state" to provide written notice of an HSR filing to the Attorney General. *See* FL 2022 SB 1112, https://www.flsenate.gov/Session/Bill/2022/1112/BillText/Filed/PDF; FL 2022 HB 705, https://flsenate.gov/Session/Bill/2022/705/BillText/Filed/PDF. The introduction of these bills followed an unsuccessful attempt in 2021 to require hospitals, hospital systems, and other healthcare providers doing business in Florida to notify the Florida Attorney General of an HSR filing. For healthcare deals that were not HSR-reportable, notification would have been require at least 90 days before the transaction resulted in a "material change." *See* FL 2021 SB 1064, https://www.flsenate.gov/Session/Bill/2021/1064/Analyses/2021s01064.hp.PDF. The current bills, however, include the same requirements as the 2021 bills, but are industry-agnostic. Other states, such as Massachusetts (MA ST 6D § 13), Connecticut (CT ST § 19a-486i), Washington (WA ST § 19.390.010), Oregon (OR St. Ch. 615 § 2), and Nevada (NV ST SB 329 § 1(1)) have passed some form of premerger notification requirements, but they have primarily focused on hospitals mergers, particularly non-profit hospitals and physician groups.

35 15 U.S.C. § 18a.

36 S.B. 933A, § 340 (10)(a)(i)-(ii).

37 S.B. 933A, § 340 (10)(d)(i)-(v) (exempting, for example, "acquisitions of goods or realty transferred in the ordinary course of business").

38 S.B. 933A, § 340 (10)(c)(iv).

39 S.B. 933A, § 340 10(f).

filings per year, much less litigate challenges to potentially numerous deals that the Attorney General finds anticompetitive.

Reflecting a recent trend among enforcers, the proposed Act also would require explicit consideration of a "transaction's effects on labor markets."[40] While labor effects have not typically been considered as part of federal merger review, the Federal Trade Commission and the Department of Justice Antitrust Division recently launched a joint public inquiry as part of their efforts to "modernize" federal merger guidelines that seeks comments, including from unions and employees, about "how the guidelines should analyze labor market effects of mergers."[41] The specifics of how labor market concerns can be integrated into merger analysis under the New York legislation, therefore, remain to be more fully developed.

II. Is State Antitrust Reform Necessary?

Broad in scope, the proposed Act has the potential to fundamentally change the antitrust legal and enforcement landscape in New York, with potentially far-reaching effects within and beyond the State. The Act raises the risk of chilling procompetitive business activity that may ultimately undermine the noble aims of the legislation to increase competition and protect consumers from higher prices by increasing the cost of doing business and disincentivizing business growth and innovation in New York. And if the intent is to check "Big Tech" market power, the Act may be overdoing it. Indeed, Meta paid $1 billion to acquire Instagram in 2012 and $19 billion for WhatsApp in 2014,[42] suggesting that a state threshold that is one-tenth of the federal level may be far lower than necessary to address the concern of containing "big business."[43]

At the very least, new state legislation may be premature given the significant legislative proposals making their way through Congress. A prime example is the Competition and Antitrust Law Enforcement Reform Act ("CALERA"),[44] a bill that Senator Amy Klobuchar (D-Minn.) introduced in early 2021. Among many changes, CALERA would lower the evidentiary standard for merger review by rejecting what it characterizes as the courts' requirement that "government [] prove harmful effects of a proposed merger to a near certainty,"[45] particularly by entities with market power, to prevent combinations that could have an "appreciable risk of materially lessening competition, or to tend to create a monopoly or a monopsony."[46] CALERA would also lower acquisition thresholds for dominant firms to prevent "killer acquisitions" or the purchase of small, "nascent competitors" that could harm competition and further enhance their market power.[47] The Senate bill would also extend antitrust enforcement and shift evidentiary burdens to make dominant firms show that their proposed acquisition of current or potential competitors would not harm competition or otherwise

The Act raises the risk of chilling procompetitive business activity that may ultimately undermine the noble aims of the legislation to increase competition and protect consumers from higher prices by increasing the cost of doing business and disincentivizing business growth and innovation in New York.

[40] S.B. 933A, § 340 10(g).

[41] Press Release, Fed, Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

[42] Jon Swartz, *Facebook's Acquisitions of Instagram and WhatsApp are Antitrust Targets, but its Metaverse Mergers May Be the Victims*, MSN (Jan. 1, 2022), https://www.msn.com/en-us/money/companies/facebooks-acquisitions-of-instagram-and-whatsapp-are-antitrust-targets-but-its-metaverse-mergers-may-be-the-victims/ar-AASbUuG.

[43] S.B. 933A, §2.

[44] S.225 - 117th Congress (2021-2022).

[45] S.225, § 2(a)(15)(D).

[46] S.225, § 4(b)(1).

[47] S.225, § 2(a)(12), (20).

lead to increased market concentration.[48] Indeed, CALERA alone seeks to address many of the concerns the New York legislation aims to solve.

Other pieces of federal legislation have been introduced with some degree of bipartisan support that are designed to further combat allegedly anticompetitive practices of online platforms. For example, the American Choice and Innovation Online Act ("ACIOA"), would bar many online platforms from what has been labelled "self-preferencing" their own products and offerings over those of their competitors, and from "discriminat[ing] among similarly situated business users."[49] Purportedly to increase competition in online platforms by restricting their ability to act as "gatekeepers," ACIOA could usher in significant changes that may address some of the concerns driving the New York bill.

Moreover, the New York Attorney General has demonstrated that it has tools to challenge exclusionary conduct, including by large corporations in the technology sector and beyond, under existing state and federal law. In recent years, for example, New York Attorney General Leticia James led a lawsuit against Meta as a part of a coalition of 48 states for unlawful monopolization under Section 2 of the Sherman Act and Section 7 of the Clayton Act.[50] In the labor space, Attorney General James has aggressively pursued labor practices under Section 1 of the Sherman Act, as well as under Section 340 of the Donnelly Act, which already prohibits unlawful collusion. In September 2021, Attorney General James also settled an investigation that concluded that one of the largest title insurance companies had entered into an unlawful no-solicit and no-hire agreement with its rivals.[51] These developments beg the question of whether the legislative concerns underlying the proposed Act may be addressed by more aggressive enforcement of current laws as opposed to a change in the law.

This dramatic departure from U.S. antitrust norms and significant expansion of the Donnelly Act risks unnecessarily penalizing firms for engaging in conduct that is currently permissible under federal law.

III. Conclusion

The proposed Twenty-First Century Antitrust Act's breadth, vagueness, and criminalization of conduct previously considered procompetitive, combined with its introduction of new private class actions and pre-merger filing requirements, if enacted, would signal a new era of risk and compliance challenges for firms conducting business in New York.

Companies located in or doing business in New York would likely see significantly increased risk of being exposed to antitrust liability. Indeed, companies large and small with relatively low market shares—as low as 30% (for buyers) and 40% (for sellers)—in relatively narrowly defined product or geographic markets could face "abuse of dominance" claims in state-court actions brought by putative classes seeking to recover treble damages. This dramatic departure from U.S. antitrust norms and significant expansion of the Donnelly Act risks unnecessarily penalizing firms for engaging in conduct that is currently permissible under federal law, potentially deterring business growth and procompetitive activity within the State.

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[48] S.225, § 2(b)(4).

[49] S.2992 - 117th Congress (2021-2022), § 3(a)(3).

[50] At the heart of the lawsuit is Meta's alleged dominance of social media and whether it acquired potential competitors, including WhatsApp and Instagram, and unlawfully excluded others from the market to increase its market share, which the State Attorneys General claimed violated Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* New York v. Facebook, Inc., 1:20-cv-03589 (D.D.C. Dec. 9, 2020).

[51] Press Release, N.Y. Atty. Gen., Attorney General James Ends Harmful Labor Practices at One of Nation's Largest Title Insurance Companies (Sept. 9, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-ends-harmful-labor-practices-one-nations-largest-title.

The Act's premerger notification requirement would also capture many relatively insignificant deals by small and medium-sized firms and startups that would not be reportable under the HSR framework. This would add uncertainty, cost, and delay for many transactions—twice as long as under the HSR framework—that may ultimately be competitively neutral, as most deals tend to be. Certainly, smaller transactions can create competitive issues, and the New York Attorney General may still want to be looking for those. But given the breadth of the filing requirement, which would capture all transactions, including those with little to no connection to the State, across virtually all business sectors valued at $10 million or more, New York enforcers may be devoting their limited resources to the search for a needle in a haystack, and the risk of overenforcement may ultimately outweigh its benefits to consumers and competition.

By effectively banning all employee non-competes—even if they are designed to protect businesses from unfair competition in connection with a procompetitive joint venture—the Act would also add a new analytical step to transactions as a condition of clearing a deal. But the transacting parties may be competitors in labor markets even though they are not competitors in any downstream products or services. This would be a major new factor that companies will need to account for as they contemplate deals in New York should the bill become law.

Indeed, should the Act be passed and signed by Governor Kathy Hochul, companies will need to reconsider how they conduct their business activities in New York, including implementing processes for monitoring their contracting, negotiations, and transactions to ensure compliance under the new regime and avoid liability, including criminal penalties. ●

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