S.335 (Gianaris) / A.2015 (Peoples-Stokes)

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BILL

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SUBJECT

Twenty-First Century Anti-Trust Act

DATE

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OPPOSE

The Business Council strongly opposes S.335 (Gianaris) / A.2015 (Peoples-Stokes), which would replace New York's antitrust laws with the most anti-consumer and anti-competitive law in the nation and perhaps the industrialized world; making New York a global outlier to the detriment of all New Yorkers.

Existing Article 22 of the General Business Law (also referred to as the Donnelly Act) was adopted in 1899, modeled on the federal Sherman Antitrust Act. It bans contracts or other forms of agreements that either result in a monopoly "in the conduct of any business or in the furnishing of any service, or that restrains trade" or that otherwise result in a constraint of trade. Through amendments and more than a century of judicial interpretation, the Donnelly Act has come to closely follow the federal Sherman Act.

Today, modern application of antitrust law is focused on addressing anti-competitive conduct and its impact on consumers.

In contrast, this proposed legislation would apply significantly increased penalties to violations that constitute the "abuse" of a "dominant position" in the conduct of any business or commerce – key terms that are undefined in the legislation. While it is important for antitrust laws to be enforced against anti-competitive conduct, the resulting vague and broad provisions of **this bill would allow enforcement and penalties against business conduct that is clearly pro-competitive and results in consumer benefits.** The bill would also significantly expand litigation costs for New York businesses, by authorizing private class action suits for the recovery of damages.

Even national leaders who believe in antitrust reform have recognized that the language in this bill is excessively vague, overbroad, and anti-consumer. For example, the **California Law Revision Commission (CLRC), made up of officials appointed by the California Governor and consented by the California Senate, has been tasked with reviewing and making**

recommendations to the state's antitrust laws. In October 2023, the Senate sponsor of this bill presented to the CLRC on this proposed bill. Following Senator Gianaris's presentation, the CLRC's Single-Firm Conduct Working Group, composed of leading progressive antitrust experts, outright rejected the Twenty First Century Anti-Trust Act and its proposed adoption of vague and undefined legal standards such as "*dominant position*" and "*abuse of dominance*." The Working Group explained that these terms are "*defined very broadly*" and have "*unavoidable ambiguity*." Importantly, they commented that the bill "*might thus be understood to prohibit desirable, procompetitive conducts such as designing a better product or developing a more efficient means of distribution when doing so harms competitors or reduces their incentives to compete*." The Working Group definitively concluded that the bill is "*intended to protect competing businesses, even at the expense of consumers and workers*," and for those reasons "do not believe that the New York bill provides a good model." (emphasis added).

Indeed, this legislation is rife with issues that would damage businesses, undermine federalist principles and violate international anti-competitive norms and agreements. Specifically, but not exclusively, the bill would do the following:

On "Abuse of Dominant Position":

- The proposed provision is extraordinarily broad and has no basis in U.S. antitrust jurisprudence;
- It would seek to import European-style concepts of how companies should behave into the U.S.;
- The statute is not restricted to big companies, it would apply to any company within New York that has a strong position in its local market, which could include hospitals, physician practices, resorts, tourism services, outlet stores, waste management companies, etc.;
- Any company in the State that uses standard conditions or terms could be found to be "dominant" under the statute;
- The bill threatens to make unlawful ordinary and procompetitive business conduct, such exclusive suppliers, distributors, business partners, and joint venture partners, even if the proposed conduct overall is better for consumers – merely because a competitor or other complaining party claims to be negatively impacted;
- The bill deviates drastically from the purpose of antitrust enforcement by deeming certain labor violations to be direct evidence of antitrust violation, including interfering with or restraining workers right to unionize and

collectively bargain, and also makes it illegal for a business to protect their intellectual property and proprietary information through banning non-compete agreements;

- For enforcement, the bill is not limited to the New York AG, but rather permits enforcement by private parties and class action attorneys, potentially unleashing a torrent of class action litigation against New York businesses based on this vague and unpredictable standard.

On the Bill's New Merger & Acquisition Filing Requirement:

- The Bill would propose a first in the nation requirement to notify the New York Attorney General of transactions, creating a huge burden on commerce and ordinary business transactions;
- The Bill requires any business that conducts business in New York, regardless of where a transaction is occurring and the extent to which it affects the New York economy, to notify the New York Attorney General of transactions;
- The Bill violates numerous best practices that have been promulgated by the International Competition Network ("ICN"), a group of leading international antitrust enforcers, including our own federal antitrust agencies, and diverges from Antitrust Pre-Merger Notification model legislation approved by the Uniform Law Commission, a state body that seeks to represent all 50 states; instead, this bill would eschew multistate cooperation and set up a New York-only standard;
- ***Instead of being a leader in excellence for antitrust enforcement, it would make New York an outlier in terms of following international and national norms and best practices for regulating international and national commerce.***

On the bill's prohibition of "unfair methods of competition":

- This definition and provision are incredibly vague and provide the Attorney General with unprecedented, and likely unconstitutional, rulemaking authority to "declare certain conduct or practices as unfair methods of competition."
- This bill would grant a single individual—the Attorney General—authority to deem anything he or she wants unlawful through rulemaking. Further, it would provide the AG with a disproportionate ability to influence and steer market outcomes, even those that benefit consumers.

As an association representing over 3,200 businesses in a wide range of industry sectors, The Business Council understands and supports the

importance of our antitrust laws in helping to promote healthy competition in our free market. The protection provided to markets by our existing antitrust laws has fostered economic growth and innovation, allowing consumers to benefit from higher quality products and better services, all at lower prices.

The system works well. Historically, antitrust laws have been narrowly written and applied, and have focused on protecting consumers from anti-competitive actions. Even so, current federal and state antitrust laws remain actively enforced, and their core principles have been adapted to apply to new types of industries, businesses and markets.

In contrast, this proposed legislation would result in a dramatic change to the Donnelly Act and provide expansive authority for both the Attorney General and private plaintiffs to bring cases in response to market activities they disfavor.

The bill provides no guidance as to what constitutes a "dominant position," nor does it provide any specifics on what would constitute the abuse of such position.

As important, the implications of these proposed changes do not solely target "big business". **Businesses can be viewed as holding a "dominant position" depending on how the market is defined.** A narrow market definition can make a business dominant, thus allowing a plaintiff to argue that business is dominant and its conduct is abusive.

Antitrust enforcement today appropriately places consumers at the heart of the law. This legislation would move away from that standard. In fact, contrary to existing federal and state antitrust statutes, aimed clearly at assuring market competition for the benefit of consumers, this legislation seems to provide protection to other market participants, including those impacted by more successful competitors. As the U.S. Supreme Court has said in United States v. Grinnell Corp., 384 U.S. 563 (1966), the purpose of antitrust law "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Consumers are the main beneficiaries of competition, and antitrust is intended to protect them from business conduct that damages such competition.

As publicly stated by the Senate sponsor and outlined within the bill's memo, this push is intended to go after the largest tech companies – but the truth is that its impact will be felt across all business sectors. Such broad powers held by state antitrust enforcers would provide enormous leverage over all categories of business and could dictate specific outcomes in each sector of

the economy, giving the state and plaintiffs the ability to pick winners and losers among competing businesses.

The Business Council is committed to promoting vigorous competition among businesses in our economy and the just and effective enforcement of current law. Antitrust is not regulation. Antitrust is about ensuring market forces determine market outcomes. In contrast, regulation is a conscious decision to steer specific outcomes in the market. **Efforts to change the antitrust law in New York should not alter antitrust into a tool to steer market and labor outcomes and should certainly not do so on the backs of average New York consumers.**

The Donnelly Act has served the state well and remains adequate to address this important public policy concern. However, we believe that this legislation would serve to undermine competition rather than enhance it, by creating and applying new, undefined criteria to regulate market behavior, and ultimately, do significantly more harm than good for the state and its citizens.

This bill will chill New York's economy and efforts to spur economic development, and to be frank, will drive businesses and jobs from New York. On behalf of our 3,200 members, The Business Council strongly opposes the adoption of S.335 (Gianaris) / A.2015 (Peoples-Stokes) and urges the Legislature to reject passage.