FIRST SUPPLEMENT TO MEMORANDUM 2023-43

Antitrust Law: Status Report

At its October 19, 2023, meeting,[1] the Commission will be hearing a presentation regarding New York Senate Bill 6748 (Gianaris), the "Twenty-First Century Anti-Trust Act".

As background for that discussion, the staff provided the Commission with the text of the bill and the "sponsor memo" for the bill, along with a statement of opposition to the bill by the New York Business Council. Those materials are attached.

The staff does not endorse the views expressed in those materials. They are provided only as background for the discussion that will follow.

Respectfully submitted,

Brian Hebert
Executive Director

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

STATE OF NEW YORK

6748

2023-2024 Regular Sessions

IN SENATE

May 8, 2023

Introduced by Sens. GIANARIS, SALAZAR, HOYLMAN-SIGAL, JACKSON, KAVANAGH, MAY, SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade, and in relation to authorizing a class action lawsuit in the state anti-trust law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "Twenty-First Century Anti-Trust Act".

§ 2. Legislative findings. The legislature hereby finds and declares that there is great concern for the growing accumulation of power in the hands of dominant corporations. These companies possess great and increasing power over all aspects of our lives. More than one hundred years ago, the state and federal governments identified these same problems after corporate combinations and trusts came to dominate the economy. Seeing those problems, the state and federal governments enacted transformative legislation to combat cartels, monopolies, and other anti-competitive business practices. It is time to update, expand and clarify our laws to ensure that these dominant corporations cannot abuse their power in ways that undermine competition to the detriment of workers, small businesses and communities in New York. The legislature further finds and declares that unilateral actions which seek to create a monopoly or monopsony are as harmful as contracts or agreements of multiple parties to do the same and should be treated similarly under the law. Firms with monopoly or monopsony power are contrary to the public interest. Accordingly, attempts to create monopolies or monopsonies through anti-competitive conduct should also be treated as actions contrary to the interests of the people of the state of New York and should be penalized accordingly. The legislature further finds and

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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declares that effective enforcement against unilateral anti-competitive conduct has been impeded by courts, for example, applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct covered by the federal anti-trust laws, and unreasonably heightening the legal standards that plaintiffs and government enforcers must overcome to establish violations of those laws. The legislature further finds and declares that one of the purposes of the state's anti-trust laws is to ensure that our labor markets are open and fair. The legislature further finds and declares that anti-competitive practices harm great numbers of citizens and therefore must ensure that those harmed by monopolies or monopsonies may seek redress through class actions.

§ 3. Section 340 of the general business law, as amended by chapter 12 of the laws of 1935, subdivision 1 as amended by chapter 893 of the laws of 1957, subdivision 2 as amended by chapter 805 of the laws of 1984, subdivisions 3 and 4 as renumbered by chapter 502 of the laws of 1948, subdivision 5 as amended by chapter 333 of the laws of 1975 and subdivision 6 as amended by chapter 31 of the laws of 1999, is amended to read as follows:

§ 340. Contracts or agreements for monopoly**, monopsony,** or in restraint of trade illegal and void. 1. Every contract, agreement, arrangement or combination whereby

A monopoly **or monopsony** in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly**, monopsony,** or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

2. **(a) It shall be unlawful for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in this state.**

(b) It 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. This paragraph shall not apply to a person or persons meeting the definition of a small business under section one hundred thirty-one of the economic development law.

(i) In any action brought under this paragraph, a person's dominant position may be established by direct evidence, indirect evidence, or a combination of the two.

(1) Examples of direct evidence include, but are not limited to, the unilateral power to set prices, terms, conditions, or standards; the unilateral power to dictate non-price contractual terms without compensation; or other evidence that a person is not constrained by meaningful competitive pressures, such as the ability to degrade quality or reduce output without suffering reduction in profitability. In labor markets, examples of direct evidence include, but are not limited to, the use of

non-compete clauses or no-poach agreements, or the unilateral power to set wages.

(2) A person's dominant position may also be established by indirect evidence such as the person's share of a relevant market. A person who has a share of forty percent or greater of a relevant market as a seller shall be presumed to have a dominant position in that market under this paragraph. A person who has a share of thirty percent or greater of a relevant market as a buyer shall be presumed to have a dominant position in that market under this paragraph.

(3) If direct evidence is sufficient to demonstrate that a person has a dominant position or has abused such a dominant position, no court shall require definition of a relevant market in order to evaluate the evidence, find liability, or find that a claim has been stated under this paragraph.

(ii) In any action brought under this paragraph, 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 leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors. In labor markets, abuse may include, but is not limited to, imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or by restricting the freedom of workers and independent contractors to disclose wage and benefit information.

(iii) Evidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.

(c) (i) The attorney general is hereby empowered to adopt, promulgate, amend, and repeal rules, as such term is defined in paragraph (a) of subdivision two of section one hundred two of the state administrative procedure act, to carry out the purposes of paragraph (b) of this subdivision, including those considerations specified in the findings and declarations of the legislature for this act.

(ii) Before any such rule shall take effect, at such time that the attorney general is prepared to file a notice of adoption pursuant to subdivision five of section two hundred two of the state administrative procedure act, the attorney general shall transmit a copy of the rule in its final form to the temporary president of the senate and the speaker of the assembly and, in addition, shall provide any relevant information regarding the need for such rule. Such proposed rule, or proposed repeal of a rule, is subject to the denial by both houses of the legislature and shall take the form of a resolution. Each house of the legislature shall have sixty days following the transmission of such rule to issue denial by resolution or take no action. Such rule shall not take effect if both houses pass a resolution denying such proposed rule within the time prescribed by this subparagraph.

(iii) 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. The attorney general may issue other guidance with respect to paragraph (b) of this subdivision.

(iv) Nothing in this section shall be deemed to diminish the jurisdiction of the public service commission.

3. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed

insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law; and further provided, that nothing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article twenty-three of the insurance law.

[~~3.~~] **4.** The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions**, nor to the creation, production, and dissemination of a single expressive work that is copyrighted, including but not limited to, a streaming series, television programs and or motion pictures**.

[~~4.~~] **5.** The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen**, including employees and independent contractors,** to combine in unions, organizations and associations, not organized for the purpose of profit**, to establish or maintain union apprenticeship or training programs that may lead to any government-issued trade license, or to bargain collectively concerning their wages and the terms and conditions of their employment. Nothing in this section shall be deemed to prevent or create liability with respect to any actions to comply with article eight or nine of the labor law. A bona fide collective bargaining agreement, project labor agreement or any other agreement lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall not be considered evidence of a violation or dominance under this section**. **Project labor agreement shall have the meaning specified in section two hundred twenty-two of the labor law.**

[~~5.~~] **6.** An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. The state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of this section, shall recover three-fold the actual damages sustained thereby, as well as costs not exceeding ten thousand dollars, and reasonable attorneys' fees. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall be served upon the attorney-general. Where the aggrieved party is a political subdivision or public authority of the state, notice of intention to commence an action under this section must be served upon the attorney-general at least ten days prior to the commencement of such action. This section shall not apply to any action commenced prior to the effective date of this act.

[~~6.~~] **7.** In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions. In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal

overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

8. Any damages recoverable pursuant to this section may be recovered in any action which a court may authorize to be brought as a class action pursuant to article nine of the civil practice law and rules.

9. An arrangement, as this term is used in this article, includes, but is not limited to, a contract, combination, agreement or conspiracy.

10. (a) Any person conducting business in the state which is required to file the Notification and Report Form for Certain Mergers and Acquisitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. s. 18a (a), shall provide the same notice and documentation in its entirety to the attorney general at the same time that notice is filed with the federal government.

(b) The following classes of transactions are exempt from the requirements of this section:

(i) acquisitions of goods or realty transferred in the ordinary course of business;

(ii) the creation, production, and dissemination of a single expressive work that is copyrighted, including but not limited to, a streaming series, television programs and or motion pictures;

(iii) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(iv) transfers to or from a federal agency or a state or political subdivision thereof;

(v) transactions specifically exempted from the provisions of this article; and

(vi) such other acquisitions, transfers, or transactions, as may be exempted under paragraph (f) of this subdivision hereunder.

(c) Any information or documentary material filed with the attorney general pursuant to this subdivision shall be exempt from disclosure under article six of the public officers law, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

(d) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this subdivision shall be liable to the state for a civil penalty of not more than ten thousand dollars for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the attorney general.

(e) In considering any transaction under this subdivision, the attorney general shall consider such transaction's effects on labor markets.

(f) The attorney general is hereby empowered to:

(i) define the terms used in this subdivision;

(ii) exempt, from the requirements of this subdivision, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the provisions of this article; and

(iii) adopt, promulgate, amend, and rescind other rules and regulations to carry out the purposes of this subdivision.

§ 4. Section 341 of the general business law, as amended by chapter 333 of the laws of 1975, is amended to read as follows:

§ 341. Penalty. Every person or corporation, or any officer or agent thereof, who shall [~~make or attempt to make or enter into any such contract, agreement, arrangement or combination or who within this state shall~~] do or attempt to do, within this state, any act [~~pursuant thereto~~] declared unlawful under subdivision one and paragraph (a) of subdivision two of section three hundred forty of this article, or in, toward

or for the consummation thereof[~~, wherever the same may have been made~~], is guilty of a class [~~E~~] **D** felony, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding one [~~hundred thousand~~] **million** dollars, or by imprisonment for not longer than four years, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding one **hundred** million dollars. An indictment or information based on a violation of any of the provisions of this section must be found within [~~three~~] **five** years after its commission. No criminal proceeding barred by prior limitation shall be revived by this act.

§ 5. Section 342-a of the general business law, as amended by chapter 275 of the laws of 1962, is amended to read as follows:

§ 342-a. Recovery of civil penalty by attorney-general. In lieu of any penalty otherwise prescribed for a violation of a provision of this article and in addition to an action pursuant to section three hundred forty-two of this article, the attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to recover a penalty in the sum specified in section three hundred forty-one of this article for the doing in this state of any act [~~herein~~] declared to be illegal **in this article**, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination [~~herein~~] prohibited **by this article**, wherever the same may have been made. The action must be brought within [~~three~~] **five** years after the commission of the act upon which it is based.

§ 6. Section 342-b of the general business law, as amended by chapter 420 of the laws of 1975, is amended to read as follows:

§ 342-b. Recovery of damages by attorney general. In addition to existing statutory **and common law** authority to bring such actions on behalf of the state, [~~and~~] public authorities, **and resident persons and entities,** the attorney general may also bring action on behalf of any political subdivision or public authority of the state upon the request of such political subdivision or public authority**, or in the name of the state, as parens patriae, on behalf of persons and other entities residing in the state of New York,** to recover damages for violations of section three hundred forty of this article, or to recover damages provided for by federal law for violations of the federal antitrust laws. In any class action the attorney general may bring on behalf of [~~these or other subordinate~~] governmental entities, any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, shall be deemed to have requested to be treated as a member of the class represented in that action. The attorney general, on behalf of the state of New York, shall be entitled to retain from any moneys recovered in such actions the costs and expenses of such services.

§ 7. The general business law is amended by adding a new section 342-d to read as follows:

§ 342-d. Recovery of expert witnesses' fees and costs by attorney-general and private litigants. In any action alleging a violation of a provision of this article, including actions brought under subdivision twelve of section sixty-three of the executive law, the attorney general and private litigants shall recover reasonable fees and costs for its expert witnesses and consultants if the attorney general or private litigants prevail in such action.

§ 8. Non-compete clauses.

1. Definitions. For purposes of this section:

(a) (1) "Non-compete clause" means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.

(2) The term "non-compete clause" includes a contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. The following types of contractual terms, among others, may be de facto non-compete clauses:

i. A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

ii. A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

(b) "Employer" means a person, as defined in 15 U.S.C. 57b-1(a)(6), that hires or contracts with a worker to work for the person.

(c) "Employment" means work for an employer, as the term employer is defined in paragraph (b) of this subdivision.

(d) "Substantial owner, substantial member, and substantial partner" mean an owner, member, or partner holding at least a 25 percent ownership interest in a business entity.

(e) "Worker" means a natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. The term worker does not include a franchisee in the context of a franchisee-franchisor relationship; however, the term worker includes a natural person who works for the franchisee or franchisor. Non-compete clauses between franchisors and franchisees would remain subject to federal antitrust law as well as all other applicable law.

2. Unfair method of competition. It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

3. Existing non-compete clauses. (a) To comply with subdivision 2 of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.

(b) (1) An employer that rescinds a non-compete clause pursuant to paragraph (a) of this subdivision must provide notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker. The employer must provide the notice to the worker in an individualized communication. The employer must provide the notice on paper or in a digital format such as, for example, an email or text message. The employer must provide the notice to the worker within 45 days of rescinding the non-compete clause.

(2) The employer must provide the notice to a worker who currently works for the employer. The employer must also provide the notice to a worker who formerly worked for the employer, provided that the employer has the worker's contact information readily available.

(3) The following model language constitutes notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker, for purposes of subparagraph one of this paragraph. An employer may also use different language, provided that the notice communicates to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker. "A new state law makes it unlawful for us to maintain a non-compete clause in your employment contract. As of {DATE 180 DAYS AFTER ENACTMENT OF THIS LAW}, the non-compete clause in your contract is no longer in effect. This means that once you stop working for {EMPLOYER NAME}:

You may seek or accept a job with any company or any person-even if they compete with {EMPLOYER NAME}.

You may run your own business-even if it competes with {EMPLOYER NAME}.

You may compete with {EMPLOYER NAME} at any time following your employment with {EMPLOYER NAME}.

This law does not affect any other terms of your employment contract."

(c) An employer complies with the rescission requirement in paragraph (a) of this subdivision where it provides notice to a worker pursuant to paragraph (b) of this subdivision.

4. Applicability. The requirements of this section shall not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause. Non-compete clauses covered by this exception would remain subject to federal anti-trust law as well as all other applicable law.

§ 9. Severability. If any provision of this act, or the application thereof to any person or circumstances, is held invalid or unconstitutional, that invalidity or unconstitutionality shall not affect other provisions or applications of this act that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are severable.

§ 10. This act shall take effect immediately.

2023-S6748 (ACTIVE) - Sponsor Memo

BILL NUMBER: S6748

SPONSOR: GIANARIS

TITLE OF BILL:

An act to amend the general business law, in relation to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade, and in relation to authorizing a class action lawsuit in the state anti-trust law

PURPOSE:

To specify that any actions or practices which attempt to establish a monopoly or monopsony are illegal and void; to make unlawful that persons in a dominant position in the conduct of any business, trade, or commerce, in any labor market, abuse that dominant position; to establish premerger notification requirements; to allow recoverable damages to be recovered in any action which a court may authorize as a class action; and prohibits the use of non-compete clauses.

SUMMARY OF PROVISIONS:

Section one is the title.

Section two of the bill sets forth its overarching purpose to protect the interests of the people of New York by ensuring any attempt to create a monopoly or monopsony is prohibited by law, and to declare that effective enforcement against unilateral anti-competitive conduct has been impeded by courts.

Section three of the bill amends the section 340 of the general business law to declare any monopolization or monopsonization, attempted monopolization or monopsonization, or assertion of dominance which restrains trade or commerce unlawful. This section also details the types of direct and indirect evidence that may be used to demonstrate that a person has dominance, and the types of conduct that constitute an abuse of that dominance.

This section also sets rule-making authority for the Office of the Attorney General (OAG), and provides for a legislative veto of such rule-making, as well as provides that the OAG will issue guidance on market shares in consideration of small and medium-sized businesses. This section also makes clear that collective bargaining agreements are not to be considered evidence of a violation or dominance under the section. It also adds subdivision 8 to allow any damages recoverable pursuant to this section be recovered in any action which a court may authorize to be brought as a class action, and subdivision 9 which defines "arrangement" as a contract, combination, agreement or conspiracy. New subdivision 10 provides for premerger notification to be filed

with the attorney general and sets a penalty for those who fail to comply with the subdivision.

Section four of the bill amends section 341 of the general business law to set criminal penalties to $1,000,000 for individuals, and $100,000,000 for corporations to conform with federal law and extend the statute of limitations from three to five years. Criminal penalties under this section are limited to multilateral conduct and monopolization and monopsonization, and consist of a class D felony.

Section five amends section 342-a of the general business law to include recovery of civil penalties by the attorney general and to amend the statute of limitations from three to five years under this article.

Section six amends section 342-b of the general business law to allow the attorney general to bring action for recovery of damages on behalf of NYS residents, and as parens patriae.

Section seven amends the general business law to add a new section 342-d which allows for the attorney general and private litigants to recover expert witnesses' fees and costs if the attorney general and private litigants prevail in such action for damages.

Section eight prohibits the use of non-compete clauses between an employer and a worker.

Section nine establishes a severability clause.

Section ten sets the effective date.

EXISTING LAW:

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JUSTIFICATION:

Anti-trust laws are designed to promote a diverse economy by allowing for competition and preventing monopolies and monopsonies. Unilateral actions that seek to create a monopoly are just as harmful as contracts or agreements of multiple parties to do the same, and thus, such actions must also be banned by law. In addition, the abuse of a dominant position in a market can cause great harm to buyer and seller markets. Powerful corporations, particularly in Big Tech, have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them. Such actions are contrary to the interests of the people of the state of New York and should be penalized accordingly. Moreover, an abuse of dominance standard like the one drafted in this bill is used in many other places across the world both within and outside of the EU, and will aid the state in addressing abuses by dominant firms.

S. 6748 (Gianaris)

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BILL

S. 6748 (Gianaris)

SUBJECT

Twenty-First Century Anti-Trust Act

DATE

May 10, 2023

OPPOSE

The Business Council strongly opposes S.6748 (Gianaris), 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 the opportunity to bring cases under antitrust, by authorizing private class action suits for the recovery of damages.

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 prohibits ordinary and procompetitive business conduct, such exclusive suppliers, distributors, business partners, and joint venture partners, without regard to whether the proposed conduct overall was better for consumers;
- 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.

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 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 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 as it does not require any showing of potential or actual harm to consumers arising from the business conduct in question. 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 stated by the Senate sponsor, 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 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.

For these reasons, The Business Council and its 3,200 members strongly oppose adoption of S.6748 (Gianaris).