SECOND SUPPLEMENT TO MEMORANDUM 2023-43

Antitrust Law: Additional Materials

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

In connection with that discussion, attorney Daniel Robbins submitted a letter from the Antitrust Section of the American Bar Association commenting on prior versions of the bill. He urges the Commission to read it as further background on this topic. It is attached.

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.

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June 14, 2021

Via Email:
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Senator Michael Gianaris
Deputy Majority Leader, 12th District
New York State Senate
c/o Jennifer N. Weintraub, M.A.
Legislative Director

SUBJECT: Comments on Proposed New York Donnelly Act Amendments

Dear Senator Gianaris:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments on the proposed Donnelly Act Amendments in Senate Bill S933A, Assembly Bill A1812A, and Assembly Bill A3399.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this document, I will be happy to provide further comments.

Sincerely,

Gary P. Zanfagna
Chair, Antitrust Law Section

Attachment

COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON CERTAIN ASPECTS OF NEW YORK SENATE BILL 933A, NEW YORK ASSEMBLY BILL 1812A, AND NEW YORK ASSEMBLY BILL 3399

June 14, 2021

The views stated in this submission are presented on behalf of the Antitrust Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments concerning the premerger notification requirements of New York Senate Bill 933A ("S933A") and its counterpart in the New York State Assembly, New York Assembly Bill 1812A ("A1812A") (both referred to as the "Twenty-First Century Anti-Trust Act"), and the unilateral conduct provisions of S933A, A1812A, and New York Assembly Bill 3399 ("A3399").[1] The Section is available to provide additional comments or assistance in any other way that the New York State Senate or New York State Assembly may deem helpful and appropriate.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

[1] S933A, 2021-2022 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/s933/amendment/a; A1812A, 2021–22 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/a1812/amendment/a; A3399, 2021–22 Regular Sess. (N.Y. 2021), *available at* https://www.nysenate.gov/legislation/bills/2021/A3399.

[2] Prior comments submitted by the Section have been archived online and can be accessed on its website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

I. Executive Summary

A. S933A and A1812A Premerger Notification

The Section appreciates the opportunity to comment on S933A and its Assembly counterpart, A1812A. The Section has substantial concerns about the premerger notification requirements of S933A and A1812A and strongly recommends that New York not pass S933A or A1812A into law as currently drafted.

New York, like all other states, does not have a general premerger notification requirement that must be satisfied before parties can close their transactions. S933A and A1812A would introduce such a requirement, but its ambiguity and scope would burden not only private parties, but also the State's resources; duplicate, rather than complement, work done by federal antitrust authorities as is done today; subject parties to an unnecessary risk of penalties; and potentially chill commerce in the State.

The federal law that has required premerger reporting since 1978, the Hart-Scott-Rodino ("HSR") Act, already obligates merging parties to file notifications with the federal antitrust authorities and wait the requisite period under the statute before closing. In the Section's experience, there is already strong cooperation between federal and state antitrust authorities, including the Office of the New York Attorney General ("NY AG"). In a large number of merger investigations, state attorneys general, including the NY AG, investigate mergers alongside the federal antitrust authorities, namely, the U.S. Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC").

As drafted, S933A and A1812A would result in submission of perhaps tens of thousands of premerger notifications to New York. By comparison, the federal antitrust authorities receive approximately 2,000 premerger notifications each year and on average determine that less than 3% require a significant investigation, and even fewer merit enforcement. In other words, with far narrower reporting requirements than S933A or A1812A and more than 40 years of experience in reviewing premerger notifications, the federal authorities determine that more than 97% of transactions do not merit an extended review because they are not problematic under the competition laws. The DOJ and FTC allow more than 97% of notified transactions to close within 30 days, and more than 50% of deals in fewer than 30 days. S933A and A1812A would extend the waiting period to 60 days for all deals, whether they are problematic or not.

The Section believes that to effectively review the filings it would receive under S933A or A1812A, New York would have to devote significant resources. Many of those resources would be wasted in that most would go to reviewing transactions that are not likely to be problematic, that have little nexus to New York, or that the federal authorities have also reviewed, amounting to duplicative review.[3]

[3] The Section has previously advocated against duplicative, unnecessary, and parallel premerger regimes that cover a jurisdiction. *See* ABA, Section of Antitrust Law, Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the COMESA Competition Commission's Request for Comments on the Proposed Draft Guidelines to the COMESA Competition Regulations, 2004 (June 2013),

Although there are limited examples of some state-level merger reporting requirements that involve industries or markets likely to be of particularly local concern, the Section is not aware of any U.S. state or territory (or international sub-country level government unit) having ever implemented as broad a premerger reporting requirement as the one in S933A or A1812A.

S933A and A1812A also raise questions as to the low jurisdictional threshold, which could result in over-reporting and a worsening of the burden on the State, or lead parties to forgo transactions or structure them in ways that would undermine benefits for residents in New York.

The Section also notes that a number of provisions of S933A and A1812A do not comport with International Competition Network ("ICN") principles. The ICN is a global body of 141 national and multinational competition authorities devoted exclusively to improving antitrust laws around the world.[4] In particular, the ICN has developed and refined Recommended Practices for Merger Notification and Review Procedures that are recognized globally as the gold standard for how merger review regimes should be designed and operated. Developing nations or nations without merger review look to the ICN to help develop merger review regimes that balance a healthy business environment with vigorous merger enforcement. As detailed below, the provisions of S933A and A1812A do not comport with a number of ICN standards. The Section notes that the United States was a founding member of ICN and submits that U.S. merger review standards ought to comport with ICN values.

The Section recommends that the New York State Legislature not adopt S933A or A1812A as currently drafted.[5] However, if it does, the Section suggests that the bill include a notice period before the statute and any implementing rules would take effect. The notice period would allow the NY AG time to develop and receive public comment on implementing rules. It would also avoid unfair prejudice to parties that negotiated a transaction before S933A or any implementing rules are put in place.

By way of example, President Ford signed the HSR Act into law on September 30, 1976. The HSR Act featured a 150-day notice period before it became effective, but the DOJ and FTC were unable to issue implementing rules by the 150-day deadline. The DOJ and FTC received hundreds of public comments on several versions of the rules, which resulted in "substantial revisions." In the interim, the DOJ and FTC issued transitional rules that exempted any transaction from the HSR Act's reporting requirements until 30 days following the effective date of the final rules. The final rules were published on February 14, 1978, and became effective on August 30,

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https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v4/at_comments_comesa_201306.pdf ("Also, it seems reasonable to assume that, following the example of the European Commission, if a filing is made before the COMESA Competition Commission, this would render unnecessary any national individual filings before the Member States' national agencies. It would be advisable to acknowledge that expressly in the draft Guidelines.").

[4] ICN, What is the ICN?, https://www.internationalcompetitionnetwork.org/about/.

[5] The Section also understands that the New York State Bar Association issued a report in 2018 that opposed many of the merger notification provisions of S933A and A1812A. *See* New York State Bar Ass'n, Donnelly Act Review Committee (Oct. 12, 2018), ("[T]there appears to be no need for a legislative solution because the NY AG already has the ability to access materials submitted as part of the HSR process . . . Accordingly, the NY AG already has the tools to gather the necessary materials to conduct its merger investigations and ensure that mergers comply with New York law. Therefore, the Mergers Committee believes there is no need to revise the Donnelly Act to require merging parties to provide the same premerger notification materials that they provide to the federal agencies.").

1978. Therefore, approximately two years elapsed between the time the HSR Act was passed and the time transactions became subject to the HSR Act. Likewise, more than seven months passed between publishing of the final rules (after several draft rounds had been published) and parties becoming subject to the reporting obligations of the HSR Act.[6] If the New York State Legislature adopts S933A or A1812A, the Section urges it to amend the bill such that it does not take effect until at least one year after the NY AG issues final implementing rules.

B. S933A, A1812A, and A3399 Unilateral Conduct Provisions

The Section also appreciates the opportunity to comment on the provisions of S933A, A1812A, and A3399 that add prohibitions of certain unilateral business conduct. S933A and A1812A would add two separate unilateral conduct prohibitions. One prohibits "monopolization" as well as attempts to monopolize and conspiracies to monopolize. This prohibition is modeled on Section 2 of the federal Sherman Act, which many states have emulated. The other prohibition, which also is contained in A3399, is modeled on the competition law of the European Union, which many other countries have emulated. That provision prohibits "abuse of dominance." The Section has concerns about adopting an abuse of dominance prohibition, which has never been adopted by a jurisdiction with an adversarial legal system.

Adopting a prohibition based on Section 2 allows the New York courts to benefit from, and freely adopt, federal case law precedent. Adopting an abuse of dominance prohibition forces New York courts to construct parallel rules and standards. While New York courts could look to interpretations of courts in other countries, their use of administrative systems means that those countries have not confronted critical issues in private litigation, and it means that those countries' interpretations of substantive law could be deemed inappropriate for New York.

For the most part, the two types of unilateral conduct provisions cover the same ground; both prohibit improper conduct through which a dominant firm maintains its dominant position. Unlike an abuse of dominance provision, a provision modeled on Section 2 also prohibits improper conduct through which a firm achieves a position of dominance or attempts to do so. Whether and how an abuse of dominance provision would prohibit conduct not proscribed by a provision modeled on Section 2 would be a matter for the New York courts to determine. An abuse of dominance prohibition could be interpreted to prohibit conduct for reasons other than its anticompetitive effects, and potentially even to permit the regulation of prices. Both the uncertainty from such a prohibition and its potential undesirable reach are concerning to the Section.

II. S933A and A1812A Premerger Notification Comments

A. S933A and A1812A Increase Burdens with the Review of Many Transactions That Do Not Lessen Competition

A relatively small number of mergers and acquisitions (M&A) implicate significant antitrust issues. As set forth in the ICN's Recommended Practices for Merger Notification and

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[6] Statement of Basis and Purpose for the Final HSR Rules, 43 Fed. Reg. 33450 (1978) https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf.

Review Procedures, the goal of a premerger notification law should be to allow non-problematic transactions to proceed expeditiously, while also allowing for reasonable investigation of transactions that present antitrust issues.[7] Premerger notification is a blunt instrument in that all such notification regimes result in many more transactions being notified to government agencies than the number of transactions that necessitate a serious investigation, let alone an enforcement action (e.g., a divestiture, behavioral remedy, or litigation).[8]

The HSR Act includes exceptions, and the DOJ and FTC have adopted a number of additional good-sense exceptions or changes to HSR filing rules to reduce reporting of transactions unlikely to raise competition issues. Even with these measures, the overwhelming majority of the filings that the DOJ and FTC receive are non-problematic transactions.

Under the HSR Act, parties to a notifiable transaction must observe a 30-day (or in limited cases, 15-day) "waiting period" before closing. Until that waiting period ends, federal law prohibits the parties from consummating a notifiable transaction. At the end of the HSR waiting period, one of three events typically occurs.[9]

- Second Request. The DOJ or FTC can extend the waiting period by issuing a "Second Request," which is a subpoena for documents, data, and other information. The DOJ and FTC issue Second Requests only in those transactions that merit a substantial antitrust investigation.

- Natural Expiration of the Waiting Period. If the DOJ and FTC take no action to extend the waiting period by issuing a Second Request, the parties are free to close the transaction.

- Early Termination. The DOJ and FTC have discretion to grant early termination of the HSR waiting period, which, if granted, allows transacting parties to close their deal ahead of the end of the statutory waiting period.

[7] ICN, Recommended Practices for Merger Notification, at 11, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.
[8] *Id*.
[9] In limited circumstances, a buyer may choose to withdraw its filing, and resubmit it to the DOJ and FTC within two business days without paying another filing fee. Transacting parties sometimes employ this strategy if the DOJ or FTC needs more time to investigate and there is some likelihood of avoiding or narrowing a Second Request investigation.

Table 1 below reports the number of transactions reported under the HSR Act, the number of Second Requests issued, and the number of transactions that were subject to a waiting period of 30 days or less.

Table 1[10]

	2015	2016	2017	2018	2019	Average
HSR Transactions Reported (Adjusted)[11]	1,754	1,772	1,992	2,028	2,030	1,915
Second Requests Issued	47	54	51	45	61	52
% of Transactions Receiving Second Request	2.7%	3.0%	2.6%	2.2%	3.0%	2.7%
Waiting Period Lasted 30 Days or Less	1,754	1,778	2,001	2,066	2,028	1,925
# of Transactions in which ET was Requested	1,366	1,374	1,552	1,500	1,507	1,460
% of Transactions with ET Requested	78%	78%	78%	74%	74%	76%
# of Transactions in which ET was Granted	1,086	1,020	1,220	1,170	1,107	1,121
% of All Transactions in which ET was Granted	62%	58%	61%	58%	55%	59%
% of Transactions Involving an ET Request that was Granted	80%	74%	79%	78%	73%	77%

Over the last five years, just 2.7% of transactions, on average, received a Second Request that extended the waiting period.[12] In other words, in more than 97% of transactions the DOJ and FTC determined that there were either no competition issues or that any such issues did not necessitate further investigation. With the advent of a premerger notification process in S933A and A1812A, New York similarly would be devoting resources to the review of numerous transactions that do not raise substantive competition concerns—and duplicating efforts and resources already spent at the federal level.

B. Specific Features of the S933A/A1812A Reporting System Itself Exacerbate Burden Concerns

1. Low Filing Threshold

As noted above, the DOJ and FTC currently receive filings for approximately 2,000 transactions each year based on the current minimum federal filing thresholds, which are indexed to inflation. HSR Act filings are required only if the value of a transaction exceeds a minimum

[10] U.S. Dep't Justice & Fed. Trade Comm'n, HSR Annual Report, Fiscal Year 2019, Appendix A, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[11] The DOJ and FTC report both the number of transactions reported and the number of transactions reported that were eligible for a Second Request ("adjusted"). Table 1 reports the latter number, which excludes the transactions detailed in Footnote 2 of the DOJ & FTC HSR Annual Report from the denominator in the Second Request calculation. *Id*. On average over the last five years, the DOJ and FTC have received filings in 62 transactions that were not eligible to receive a Second Request. Since the criteria that make those transactions ineligible for a Second Request are not necessarily present in S933A or A1812A, Table 1 is likely conservative in that it undercounts the number of filings that New York would have to review under S933A or A1812A.

[12] Over the last 10 years (2010-2019), the DOJ and FTC issued Second Requests in 3.1% of transactions (adjusted). Since 2000, that number is 2.96%, and ranges from a high of 4.5% in 2009 to a low of 2.1% in 2000.

threshold set at $92 million in 2021. The minimum transaction value threshold in S933A and A1812A would adjust for inflation and be just $9.2 million currently, which is much lower than even the *original* federal threshold of $15 million that took effect more than 40 years ago in 1978.[13] $15 million in 1978 dollars is roughly equivalent to $61 million today. In other words, S933A and A1812A adopt a reporting threshold more than *six times smaller* than the original HSR Act threshold that took effect in 1978.

Although there are various sources of deal volume, parties to transactions reported to Bloomberg 6,147 deals involving U.S. companies in 2020 that were valued at $9.2 million or more. Expanding to global deals, a number of which could be caught by the jurisdictional requirements of S933A and A1812A, that number grows to more than 47,000.[14] And even these figures underestimate the potentially reportable transactions under S933A and A1812A. Parties might not report confidential deals to Bloomberg's database, and these figures do not capture large dollar value stock trades (e.g., by mutual funds or other institutional investors) that could trigger filing requirements due the lack of an exemption for de minimis (in terms of percentage ownership) passive investments in the bills—an exemption that is part of the HSR Act.[15] As such, S933A and A1812A could result in New York receiving between at least 3 and 20 times the number of filings that the federal agencies receive and likely many more.

2. Longer Effective Waiting Period

As drafted, S933A and A1812A require that merging parties file their notification "no later than 60 calendar days before closing of the acquisition." This is in effect a waiting period that must be observed prior to closing and one that is double the typical 30-day waiting period under the federal HSR Act. For the many transactions that do not raise substantive concerns discussed above, this timing creates unnecessary delay.

The ICN recommends that merger review systems permit non-problematic transactions to proceed "expeditiously" and that initial review periods should expire within six weeks (42 days) or less.[16] Under the federal system, not only are the waiting periods shorter, but merging parties can request that the DOJ and FTC terminate the waiting period early (such early termination is

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[13] The Section understands Section 10(a)(i) of S933A and A1812A to set New York's "size of transaction" threshold at 10% of the HSR Act size of transaction threshold ($92 million in 2021), i.e., $9.2 million in 2021. However, the reference to 15 U.S.C. § 18a(a)(2) is ambiguous as there are multiple thresholds under that portion of the HSR Act. The Section recommends that S933A and A1812A be clarified, presumably to refer to the threshold in 15 U.S.C. § 18a(a)(2)(B)(i), and reference $50 million as adjusted (i.e., $92 million for 2021). While the Section agrees that merger thresholds ought to be indexed to some measure of growth, for the reasons set forth herein, the absolute value of the threshold is too low.

[14] Based on Bloomberg terminal data available just prior to the finalization of this comment.

[15] To illustrate just how significant such institutional investor trades could be, one investment fund cautioned the FTC that a proposed change to its HSR rules (i.e., removing a certain limitation that does not exist in S933A or A1812A) could result in 400–500 HSR filings for that business alone. Letter from Sandra Boss, Senior Managing Dir., Global Head of Investment Stewardship, BlackRock to FTC (Feb. 1, 2021), https://downloads.regulations.gov/FTC-2020-0085-0014/attachment_1.pdf.

[16] ICN, Recommended Practices for Merger Notification, at 11, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

also known as "ET").[17] Approximately 74% of transactions involve a request for ET, and the DOJ and FTC grant ET in 57% of transactions.[18] Although the agencies do not publish statistics about the timing of their ET grants, in the experience of the Section, historically many grants of ET occur within 7–14 days of the HSR filing as the federal authorities have become efficient in their review of transactions. In summary, the federal waiting period lasts no more than 30 days for 97% of transactions and it lasts less than 30 days for nearly 60% of transactions.[19]

For the 97% of transactions each year that do not present competition issues, S933A and A1812A likely would double the waiting period beyond what is already required. And for the 57% of deals that receive ET from the federal authorities, the waiting period under S933A and A1812A would be three to four times longer than it is today. The Section submits that S933A and A1812A are not consistent with ICN principles and questions whether there is a justification sufficient to impose a longer waiting period on the numerous non-problematic transactions captured by the S933A and A1812A premerger reporting system.[20]

The effect of delaying non-problematic transactions is not costless. Non-problematic M&A can have significant procompetitive consequences that benefit consumers, including New York consumers. Examples include lower costs; new product options; saving a failing company from going out of business; improved operations, investment, or R&D; or sales into new geographies. Moreover, as detailed below in Section II.E, the low jurisdictional thresholds in S933A and A1812A would capture non-problematic transactions such as mutual fund acquisitions of public company shares, which are typically time-sensitive transactions. Delay in closing these transactions could harm those funds' performances, limit their ability to achieve their stated investment objectives, and increase risk for investors, harming the more than 50% of households with such investments, e.g., pension plans and individual savings for retirement.[21] Delaying the closing of all transactions notifiable under S933A and A1812A—most of which would be non-problematic—would necessarily delay benefits from reaching consumers in New York, nationwide, and globally. The Section also observes that over-enforcement could chill investment (including transactions in New York), deter procompetitive transactions, or unnecessarily discourage R&D, to the detriment of long-term consumer welfare.

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[17] Grants of ET are public and are published on the FTC's website. A common reason why transacting parties do not request ET is that they do not want the fact of their deal to be disclosed publicly.

[18] ET is requested in only about 74% of transactions. As noted in the prior footnote, parties sometimes do not request ET out of concern over public disclosure. The agencies grant ET in 57% of all transactions filed, but do so in 77% of cases involving an ET request. In other words, but for concerns over public disclosure, many more transactions would likely receive ET and therefore have an even shorter HSR waiting period.

[19] The waiting period for certain transactions is just 15 days. By federal statute, the waiting period is just 15 days for deals involving cash tender offers and acquisitions pursuant to Section 363 of the Bankruptcy Code.

[20] *See e.g.*, ICN Recommended Practices, §§ II.B. ("Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.").

[21] Letter from Sandra Boss, Senior Managing Dir., Global Head of Investment Stewardship, BlackRock to FTC (Feb. 1, 2021), https://downloads.regulations.gov/FTC-2020-0085-0014/attachment_1.pdf.

C. The Magnitude of the Burden on New York Resources Will Be Significant

In FY2020, the FTC reported that it had 1,160 full-time equivalent employees, with a total budget of $332 million. For FY2021, the DOJ's Antitrust Division requested a budget of $188.5 million and reported 782 positions. Combined, the budget of the DOJ and FTC is more than $520 million and the agencies employ more than 1,900 individuals. Although the amount of work varies by transaction, broadly speaking, in merger reviews, agency lawyers, economists, and other staff review filings, analyze party data, review business documents, conduct independent research, and conduct interviews of third parties, among other tasks, to determine whether a transaction requires more investigation or enforcement.

By comparison, the Section understands that the budget for the *entire* Office of the New York Attorney General is just $272 million,[22] and the Antitrust Bureau of NY AG employs approximately 20 individuals, less than 1% of the NY AG's total workforce.[23] Although both DOJ and FTC have missions outside of merger review, so does the New York Antitrust Bureau. Indeed, the Section's experience with the New York Antitrust Bureau is that the bulk of its work relates to investigations of anticompetitive conduct rather than merger reviews. Although there are limited exceptions, given its limited resources, when the New York Antitrust Bureau is involved in merger reviews it typically works alongside the DOJ or FTC staff (or other state attorneys general staff), relying on federal agency staff to a substantial degree to handle much of the "heavy lifting" attendant to merger reviews. Of course, like all state attorneys general, the Section understands that the New York Antitrust Bureau conducts its own investigations and comes to its own independent enforcement decisions.

Given that S933A and A1812A may result in New York receiving exponentially more filings than the DOJ and FTC receive under the HSR Act, it is highly questionable that New York would have the staffing to handle the influx of filings and to investigate potentially anticompetitive transactions. Without a concomitant increase in resources to allow for this, S933A and A1812A would burden parties with notifications that will sit idle and only serve to increase administrative burdens and delay closings in contravention of ICN merger review principles.[24] It is worth noting that the State also could incur additional administrative costs in having to constantly interpret and provide guidance on its premerger notification system. By statute, regulation, and informal interpretations, the DOJ and FTC have articulated, in part through experience and trial-and-error, a number of exemptions to the HSR rules. Currently, the FTC has a dedicated staff of nine for

[22] Ryan Tarinelli, "$272M: NY Legislature to Approve Funding Increase for State AG's Office," Law.com, Apr. 7, 2021, https://www.law.com/newyorklawjournal/2021/04/07/272-million-ny-legislature-to-approve-funding-increase-for-state-ags-office/.

[23] Antitrust Bureau Staff Directory, https://ag.ny.gov/antitrust/antitrust-bureau-staff-directory; NY AG, Our Office, https://ag.ny.gov/our-office#:~:text=In%20fulfilling%20the%20duties%20of,matters%20affecting%20their%20daily%20lives (reporting that the NY AG employs more than 1,800 individuals).

[24] Appropriately tailored merger notification threshold tests are necessary to "limit the expenditure of public and private resources by avoiding notification and review of mergers that are unlikely to raise any competition concerns" and help prevent "unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit." ICN, Recommended Practices for Merger Notification, at 3, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

processing filings and interpreting the HSR regulations, and that office has issued more than 4,000 informal interpretations of reporting requirements and exemptions.

D. State-Level Premerger Notification Should Not Duplicate Efforts

The Section submits that given the substantial cost and burden of a premerger notification system to New York and to merging parties, such a system should be implemented in a manner that does not duplicate the reviews already occurring under the existing laws.[25] Today there is close coordination between the state attorneys general, including the New York Antitrust Bureau, and the federal antitrust authorities.[26] Indeed, the policies of both federal agencies strongly encourage close cooperation with the state attorneys general.[27] In any given merger investigation, cooperation between the DOJ or FTC and the state attorneys general reduces the burden of multiple, simultaneous, inconsistent investigations on the merging parties. It is almost always in the merging parties' interest, for example, to waive any federal confidentiality protections so that the DOJ and FTC can coordinate and communicate with any investigating state attorneys general. Moreover, states can simply use their existing investigative powers to subpoena all materials submitted to the DOJ or FTC. As a result, merging parties typically give state attorneys general reviewing the transaction access to all of the documents, data, and other information produced to the DOJ and FTC. The DOJ, FTC, and state attorneys general already:

- jointly investigate mergers and acquisitions,
- jointly incorporate the ideas and input in developing investigatory requests and subpoenas,
- jointly interview or depose witnesses,
- share or allocate responsibility for portions of the investigation,
- jointly consider settlement proposals, and
- share documents and data.

To the extent that New York merely desires to codify a requirement to provide a copy of all HSR filings to the NY AG, the Section does not believe that would be a significant burden to

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[25] *See e.g.*, ICN Recommended Practices, §§ II.B., II.E. ("Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.") ("Where possible, cooperating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens.").

[26] *See e.g.*, Fed. Trade Comm'n, Protocol for Coordination in Merger Investigations, https://www.ftc.gov/tips-advice/competition-guidance/merger-investigations ("To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger. This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties."); U.S. Dep't of Justice, Antitrust Division Manual, ch. VII, § C, at VII-9, 5th Ed. 2017, https://www.justice.gov/atr/file/761161/download ("The Division is committed to cooperating with state attorneys general. Effective cooperation between the Division and the states benefits the public through the efficient use of antitrust enforcement resources. Cooperation with the states gives the Division the benefit of local counsel who know the local markets well. It also promotes consistent enforcement and minimizes the burden of duplicative investigations.").

[27] *Id*.

merging companies. However, the need to subject parties to an entirely different state-level premerger notification regime, which is in large part duplicative of the work occurring under the existing HSR framework, is not obvious. If New York were interested in pursuing investigations of transactions that are not reportable under the HSR Act and mostly impact only New York, the Section respectfully submits that its premerger notification scheme should be more narrowly tailored.

E. Low Jurisdictional Nexus Could Worsen Burdens or Chill New York Commerce

The Section acknowledges that the recent changes to S933A's jurisdictional requirements are an improvement over the prior version of the bill, which determined jurisdiction with reference to NY CPLR Sections 301 and 302. Jurisdiction under these statutes—particularly Section 302, which pertains to long-arm jurisdiction—depends on the specific facts of each case and does not provide a bright-line rule that would clearly indicate to an acquiring or acquired person when it is subject to reporting requirements under original S933, Section 10(a)(ii). When possible, jurisdictional requirements should delineate which transactions are reportable by establishing bright-line standards based on objective criteria.

However, the Section observes that the jurisdictional thresholds in the revised Section 10 (a)(ii) are low relative to global norms and potentially risk significant excess merger reporting to the NY AG.[28] The Sections recommend these thresholds be raised considerably. The low merger reporting thresholds are likely to result in an excessive buildup of merger notifications where the NY AG will have to divert its time and resources towards reviewing transactions that primarily impact other states, a national market, or even foreign jurisdictions, and that have little or no impact on the competitiveness of markets in New York. Further, such thresholds could risk discouraging investment in the New York economy, as they may deter companies from pursuing beneficial transactions involving New York. The ICN Recommended Practices provide guidance for the appropriate thresholds, noting that they should be at a level sufficient to "screen out transactions that are unlikely to result in appreciable competitive effects."[29]

The Section understands that if New York were an independent nation, its economy would rank as the 10th largest country in the world with a GDP of approximately $1.7 trillion.[30] S933A and A1812A require a filing if *either* the acquirer or acquired company has assets or annual net sales in New York of $9.2 million. By comparison:

- France, the world's 7th largest economy (GDP, $2.9 trillion) requires a premerger control filing only if the parties' combined worldwide sales exceed ~$183 million and each party's sales in France exceed $61 million.

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[28] For example, current U.S. threshold for merger reporting is USD 92 million based on the transaction's valuation, which is 10-times larger (per the language of S933A) than the New York threshold.
[29] ICN Recommended Practices, § II.B.
[30] *Total Gross Domestic Product for New York*, FRED Economic Data, https://fred.stlouisfed.org/series/NYNGSP.

- Italy, the world's 8th largest economy (GDP, $2.1 trillion), requires a premerger filing only if the parties' combined sales exceed $607 million, and each party has more than $36 million in Italian sales.

- Canada, which has an economy roughly the size of New York (GDP, $1.8 trillion), requires a premerger control filing only if the combined assets or sales from assets in or into Canada exceed $330 million and the target's assets in Canada exceed $77 million.

- Switzerland, which has an economy roughly half the size of New York (GDP, $0.8 trillion), requires a premerger filing only if the parties' combined global sales exceed $2.2 billion or Swiss sales exceed $557 million, and both parties' sale exceed $111 million in Switzerland.[31]

Even a number of countries with economies that are multiple times smaller than New York set a far higher bar for merger control than the pending bills. Simply put, S933A and A1812A set a bar for premerger control filings that is lower than many comparable jurisdictions. And unlike the United States and New York, the Section not aware of another major jurisdiction that requires concurrent and duplicative filings for more localized geographies within it.[32]

The Section also submits that jurisdiction should not exist based solely on the acquiring company's assets or annual net sales in New York. According to the ICN, "[n]otification should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or local assets test that may be satisfied by the acquiring entity alone irrespective of any significant local activity by the business to be acquired."[33] A few examples are instructive.

- A hospital system with a nationwide footprint and a corporate headquarters in Indiana ("HospitalCo") owns two rural hospitals in Upstate New York with $50 million in New York sales. Unrelated to the New York operations, HospitalCo plans to acquire a rural hospital in New Mexico for $30 million.

- A Texas-based software company ("CodeTECH") helps restaurants in the U.S. manage municipal regulatory compliance. CodeTECH has $15 million in revenue in New York. CodeTECH plans to expand into Europe by purchasing a company there for $100 million with similar software.

- An Ohio-based restaurant holding company with no New York sales plans to purchase an Upstate New York restaurant chain with $12 million in New York sales for $30 million.

[31] *Projected GDP Ranking 2021*, STATISTICS TIMES, https://statisticstimes.com/economy/projected-world-gdp-ranking.php. The filing thresholds for the illustrative countries have been converted to U.S. dollars.
[32] If a filing is required in the European Union, Member States cannot require a filing (or even review the transaction). If Member State filings are required, but a European Commission filing is not, the Commission will not engage in a duplicative, concurrent review.
[33] ICN Recommended Practices, § II.C.

Each of these transactions lacks a significant nexus to New York by both parties, let alone an anticompetitive effect. The ICN recommends that "many jurisdictions require significant local activities by each of at least two parties to the transaction as a prerequisite for mandatory merger notification. This approach represents an appropriate material nexus screen since the likelihood of adverse effects from transactions in which only one party has a significant local presence is sufficiently remote that the burdens associated with notification are normally not warranted."[34]

Moreover, the low threshold and lack of exceptions in S933A and A1812A could have substantial negative impacts on financial markets as it would capture a number of purely financial transactions that are not likely to affect competition. For example, investment management corporations manage index funds, mutual funds, or exchange-traded funds ("ETFs") that track a specific basket of underlying investments. An index fund might hold the stock of large cap corporations, companies listed on the S&P 500, bonds, commodities, or some combination of those assets. It might hold hundreds or thousands of such assets. According to a recent report, approximately 52% of American households own some market investment, mostly from mutual funds.[35] If a large investment fund were to acquire 0.1% of the stock of a public company on the open market valued at $10 million, it could trigger a S933A/A1812A filing if the target company has assets or sales in New York valued at $9.2 million. An investment management corporation purchasing securities on the open market typically would not know or have access to information about the target's sales or assets in New York or any other state. Therefore, it would not be able to determine whether its purchase would require a filing under S933A/A1812A.

F. Any Delegation of Rulemaking to the NY AG Should Be Narrowly Tailored

While the Section acknowledges that flexibility in a premerger notification system is important because not every transaction scenario can be contemplated, the delegation of rulemaking authority to the NY AG in S933A and A1812A does not appear to be limited in any way. The NY AG is empowered not only to define terms in the statute and create reporting exemptions, but also to "adopt, promulgate, amend, or rescind other rules or regulations to carry out the purposes of this subdivision." Unlike the DOJ's Antitrust Division and FTC, which have exclusive focus on enforcement of the antitrust laws, the NY AG is a politically elected position with a broad mandate that covers "the legal rights of the citizens of New York, its organizations and its natural resources."[36] The Section cautions that rulemaking authority in a premerger notification regime should be narrowly tailored to promote enforcement of the State's competition laws and not be a vehicle for achieving social and political agendas untethered to competition.

[34] *Id*.

[35] Teresa Ghilarducci, Most Americans Don't Have a Real Stake in the Stock Market, Forbes, Aug. 31, 2020, https://www.forbes.com/sites/teresaghilarducci/2020/08/31/most-americans-dont-have-a-real-stake-in-the-stock-market/?sh=a2bc90711545.

[36] Letitia James, N.Y. Atty. Gen., Our Office, https://ag.ny.gov/our-office#:~:text=As%20head%20of%20the%20Department,organizations%20and%20its%20natural%20resources.

G. S933A's and A1812A's Labor Amendment Is Unnecessary and Not Sufficiently Limited to Harm that Results from Anticompetitive Conduct

Under S933A and A1812A, as amended, the NY AG "shall consider such transaction's effects on labor markets" (the "Labor Amendment"). The Section considers the Labor Amendment unnecessary, duplicative, and costly. Section 7 of the Clayton Act makes transactions unlawful if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Notably, Section 7 applies to "any line of commerce or in any activity affecting commerce in any section of the country." Its application is not limited to output markets, input markets, or labor markets. The Section therefore submits that the Labor Amendment is unnecessary and duplicative.

In addition, the Section submits that S933A and A1812A do not sufficiently limit the scope of the NY AG's transaction review to antitrust issues. As quoted above, the NY AG must consider the "transaction's effects on labor markets." Therefore, S933A and A1812A instruct the NY AG to consider "effects" but they fail to limit the NY AG's inquiry in either magnitude or scope. M&A transactions can result in "effects" in labor markets that are not anticompetitive effects. The Section submits that the antitrust laws should be concerned only with those transactions that have an anticompetitive effect.

III. S933A, A1812A, and A3399 Unilateral Conduct Comments

A. Introduction

Long before the first antitrust statute, common law decisions in New York condemned bid rigging.[37] In 1888, states began enacting statutes directed specifically at agreements between competitors to suppress competition in commerce. Congress acted more slowly than some of the states, but the Sherman Act became law on July 2, 1890 and its substantive prohibitions of the Sherman Act remain exactly as they were enacted on that day. Sherman Act Section 1 prohibits concerted conduct to suppress competition, including bid rigging, and Section 2 prohibits conduct by a single firm (unilateral conduct) to destroy competition. Most states have since adopted two parallel prohibitions, mirroring the Sherman Act, but New York's 1899 Donnelly Act—now codified as General Business Law Section 340—still contains a single prohibition directed to concerted conduct.

Antitrust bills pending in the New York State Legislature—S933A, A1812A, and A3399—would add prohibitions of certain unilateral business conduct. S933A and A1812A would add two separate unilateral conduct prohibitions. One would make it unlawful "to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any business, trade or commerce or the furnishing of any service in this state." This language is from

[37] *See, e.g.*, Wilbur v. How, 8 Johns. Cas. 444 (Sup. Ct. N.Y. Cty. 1811).

Section 2 of the 1890 Sherman Act,[38] so a large body of federal case law would guide New York courts on every aspect of applying this provision.[39]

All three bills would add an "abuse of dominance" prohibition, the unilateral conduct prohibition in effect in the European Union and many other countries. S933A and A1812A would make it unlawful "for any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position." A3399 declares that: "Any abuse by one or more persons of a dominant position in the conduct of any business, trade, or commerce, or in the furnishing of any service in this state is hereby declared to be against public policy, illegal, and void." A3399 also lists conduct that might constitute an abuse, including "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." A3399 adopts the language of Article 102 of the Treaty on the Functioning of the European Union, and the other bills use similar language towards the same end.[40]

If New York were to adopt an abuse of dominance prohibition, its courts would not have case law to provide guiding or limiting principles. Perhaps because abuse of dominance is a concept that is unfamiliar to U.S. courts, S933A and A1812A (but not A3399) would empower the NY AG "to adopt, promulgate, amend, and repeal rules" to "carry out the purposes of" the abuse of dominance prohibition. S933A and A1812A further provide that the NY AG must transmit proposed rules to the New York State Legislature, either chamber of which then has the opportunity prevent the rule from taking effect.

The Section has no concern about New York adopting a prohibition of unilateral business conduct that harms competition and creates or maintains a monopoly. It is anomalous for New York to lack such a prohibition. The Section, however, recommends that the New York State Legislature consider carefully the desirability of inserting an abuse of dominance prohibition into an adversarial system that includes private damages litigation. This sort of prohibition heretofore

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[38] "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 . . . ." 15 U.S.C. § 2, originally enacted as ch. 647, § 2, 26 Stat. 209 (1890).

[39] New York courts construe the Donnelly Act "in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518 (1994).

[40] "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(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."

Consolidated Treaty on the Functioning of the European Union, art. 102, 2008 O.J. C 11 5/47.

Article 102 originally went into force in 1958 as Article 86 of the EEC Treaty. No authentic English version existed until the United Kingdom joined the European Economic Community in 1973.

has been adopted only in administrative systems where the prohibition would be enforced by a government agency.[41]

B. Scope and Coverage of the Two Prohibitions under Consideration

A unilateral conduct law modeled on Section 2 of the Sherman Act is inherently broader than an abuse of dominance law because it reaches exclusionary conduct that *creates* a dominant market position,[42] or that *dangerously threatens to create* a dominant market position,[43] while an abuse of dominance prohibition applies only to conduct by an *already-dominant company*.[44] That said, both prohibitions, as they have been interpreted by jurisdictions around the world, apply in similar fashion to exclusionary conduct by already-dominant firms—a large area of overlap. Within that area of overlap, both prohibitions invite the courts (or administrative agencies) to make law in particular cases by incorporating and applying norms of marketplace behavior, such as competition on the merits.

S933A and A1812A would prohibit both abuse of dominance and monopolization. Since the two prohibitions are framed in different language, New York courts would need to carefully parse their language and, over time, material differences likely would emerge. Indeed, A3399 goes so far as to declare that its abuse of dominance prohibition must "be construed independent of" Section 2 case law, and it further encourages divergence from Sherman Act case law by specifying that no showing of harm to consumers is required under the dominance prohibition.

Although the New York courts are not obliged to follow the lead of other countries, abuse of dominance provisions have been interpreted to prohibit both the exclusionary conduct prohibited by Section 2 of the Sherman Act and "exploitative conduct," which uses monopoly power in a manner that offends social norms unrelated to competition. Regarding the latter, abuse

[41] Over the past decade, some countries with abuse of dominance prohibitions have implemented private rights of action, but no country has any substantial case law on standalone damages actions under abuse of dominance prohibitions. The EU authorized damages under member state laws in 2014. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. [2014] O.J. L 349/1. Private litigation in these countries generally does not provide for extensive discovery, and this regime anticipates that damages actions normally will follow administrative determinations of violations. Thus far, private damages actions have been confined almost entirely to cartels. It is too early to tell whether the EU's push for more private enforcement will impact the substantive legal doctrine, as some have observed in connection with Section 2 of the Sherman Act.

[42] "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[43] The offense of "attempted monopolization under § 2 of the Sherman Act" requires "proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[44] *See, e.g.*, JONATHAN FAULL & ALI NIKPAY, EDS., THE EC LAW OF COMPETITION 228 (1999) (Article 102 "does not prevent the mere creation or possession of a dominant position. As the wording clearly states, it prohibits 'abuses' of such a dominant position.").

of dominance prohibitions are interpreted in other countries to prohibit unfairly high prices, as discussed below.

C. Monopolization and Dominance Thresholds

The starting point for both monopolization and abuse of dominance analysis is when does a firm have sufficient control of a market to violate the law. Under Section 2 of the Sherman Act, the offense of monopolization is committed when a company uses improper conduct to obtain or maintain a degree of market control termed "monopoly power."[45] The case law interpreting Section 2 holds that a large market share is necessary for monopoly power,[46] but a high market share alone is not sufficient.[47] For example, a company with a large market share in an industry that is easy to enter would not have "monopoly power." Firms found by the Supreme Court to be monopolies under Section 2 all had market shares well in excess of 50%. However, the offense of attempted monopolization requires only that monopoly power is threatened, not that it is achieved.

Under an abuse of dominance law, the offense is committed when a firm with a "dominant" market position engages in improper conduct. In some older European cases, firms were found to be dominant despite having market shares below 50%, but decades of international cooperation have produced a substantial degree of convergence.[48] As a result, the European Commission's application of the dominance threshold is not easily distinguishable from the U.S. monopoly power threshold,[49] although a few other countries apply a lower dominance threshold.

In 2017 the ICN (which is made up of national enforcement agencies around the world) promulgated a consensus-based analytical framework for dominance cases. This document reflects substantial agreement around the world on what dominance/monopoly means and how it is assessed. Critically, the document states that "[a]t most one firm in any relevant market can

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[45] *See supra* note 42.

[46] *See, e.g.*, Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) ("A market share at or less than 50% is inadequate as a matter of law to constitute monopoly power."); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share.").

[47] *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999) ("market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share").

[48] *See, e.g.*, Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards of the ABA Antitrust Law Section (Sept. 1, 2019) 36 ("While the market shares associated with some past dominance cases in Europe are decidedly lower than those associated with monopoly cases in the United States, more recent enforcement actions of both the United States and the EC have alleged market shares at or above 70 percent."), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf.

[49] *See, e.g.*, Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38(4) EUR. COMPETITION L. REV. 147, 149 (2017) ("the Commission's enforcement policy is clearly focused on companies with so-called super dominant shares in excess of 70%").

possess" a dominant or monopoly position.[50] This document would be a useful reference for New York courts applying an abuse of dominance prohibition.

Notably, A3399 does not provide guidance to the courts as to how high the dominance threshold is meant to be set. In the end, the New York courts applying A3399 will have to make a choice. They might interpret the legislation to command a dominance threshold lower than the monopoly threshold under Section 2 of the Sherman Act. Or they might determine that dominance and monopoly are indistinguishable legal concepts, so the thresholds should be the same.

S933A and A1812A set a dominance threshold, and the Section is concerned that it is set too low. A seller with a share of 40% is presumed dominant, as is a buyer with a share of 30%. In addition, S933A and A1812A permit dominance to be established without regard to market shares when a firm can "dictate" contractual terms. Any firms using standard contract terms downloaded from the Internet could be found to be dominant. The Section believes that S933A and A1812A would set the dominance threshold substantially lower than it is currently set in Europe and would convert ordinary business disputes into antitrust damages cases.

D. Exclusionary Abuse of an Existing Dominant Position

International scholarship and cooperation among enforcement agencies over decades has produced a substantial degree of convergence on substantive law and policy relating to unilateral exclusionary conduct. Remaining divergence in enforcement is due as much to differences in legal systems and societal attitudes as to differences in law and policy. From 2017 to 2019, an ABA Task Force explored the extent to which monopolization and dominance standards have converged and remaining divergence.[51]

In comparing substantive law and practice between Europe and the United States, the ABA Task Force found some areas of divergence, and these differences could motivate a preference for either an abuse of dominance prohibition or a prohibition modeled on Section 2 of the Sherman Act.[52] European antitrust law is more apt to impose a duty to deal, especially on an essential facility theory,[53] and European law, but not U.S. law, recognizes the offense of "margin squeeze" in which a dominant company's price for an input sold to downstream rival might be deemed to be exclusionary. As compared with U.S. law, European antitrust law demands a lesser showing of anticompetitive impact from practices like exclusive dealing and loyalty discounts. Also, as

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[50] International Competition Network, Unilateral Conduct Workbook—Chapter 2: Analytical Framework for Evaluating Unilateral Exclusionary Conduct ¶ 11 (May 2017), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW_Ch2.pdf .

[51] *See supra* note 48.

[52] *Id.* at 41–61.

[53] A difference on refusal to deal seems significant even if it is difficult to pinpoint. *See id.* at 43–46. Europe limits forced dealing to exceptional cases but seems to declare many cases exceptional. The United States seems to force dealing only when it was undertaken voluntarily in the first instance. *See* Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409 (2004) (describing the conduct condemned in *Aspen Skiing* as: "The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (upholding a jury verdict of a Section 2 violation from terminating voluntary arrangement).

compared with U.S. law, European antitrust law is more receptive to claims that tying and related practices use monopoly in one market to gain an advantage in a related market. Most of these points of divergence are not discernable from black letter statements of the law but can be seen in case outcomes.[54]

Although the Sherman Act does not use the word "competition," its purpose of protecting the competitive process was immediately understood by courts interpreting it. The legality of practices under the Sherman Act has always been judged by how they were understood to affect the competitive process, and not by how they affect particular competitors. In Sherman Act cases, courts work to distinguish injuries resulting from the rigors of competition from those injuries resulting from the destruction of competition.[55] New York courts surely would interpret a prohibition based on Section 2 of the Sherman Act with the same understanding, but there is no assurance that they would interpret an abuse of dominance prohibition in the same way. Nothing in the wording of the bills directs the courts to focus on the competitive process or on consumer welfare. Indeed, A3399 invites courts to sacrifice the interests of consumers by declaring that: "No showing of harm to consumer welfare shall be required to sustain a claim . . . ."

S933A and A1812A describe what constitutes an abuse of dominance in terms of impact on competitors. For example, they make refusing to deal an abuse when it has "the effect of unnecessarily excluding or handicapping actual or potential competitors." This makes refusing to deal essentially per se unlawful for dominant firms, notwithstanding possible legitimate business reasons for refusing. S933A and A1812A further declare that "pro-competitive effects shall not . . . cure competitive harm," and thus appears to make impact on the competitive process irrelevant when a competitor is harmed. The Section strongly cautions against any statutory language that can be construed to protect competitors rather than competition.

E. Non-Exclusionary Abuse of Dominance

Nearly all enforcement actions of abuse of dominance laws challenge exclusionary conduct, but jurisdictions with abuse of dominance prohibitions also recognize the possibility of a non-exclusionary abuse of dominance. If New York were to adopt an abuse of dominance prohibition, New York courts could read the legislation to authorize challenges to non-exclusionary abuses.

[54] The difference on margin squeeze is black letter law, as the Supreme Court rejected that theory of liability under Section 2 of the Sherman Act. *See* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009). In addition, Section 2 does not condemn the use of a monopoly in one market merely to gain a competitive advantage in another. *See Trinko*, 540 U.S. at 415 n.4; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[55] "Competition, which fosters innovation and tends to lower prices for consumers, directly pits one producer against another. When individual firms go head-to-head, one might wish that the rules of the Marquis of Queensberry, which ensure fair play, would be uppermost in the competitors' minds. The antitrust laws, however, safeguard consumers by protecting the competitive process. Those laws, unlike the Marquis of Queensberry rules, are not designed to protect competitors from one another's conduct." Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 489 (2d Cir. 2004) (footnote omitted). *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) ("the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself").

The principal category of non-exclusionary conduct that has been held to come within the ambit of abuse of dominance prohibitions is what is termed "exploitative" abuse. In short, exploitative abuse is charging unfairly high prices. The concept of exploitative abuse has been viewed with alarm by many Americans. One reason is that exploitative abuse seems oxymoronic: abuse of dominance laws do not prohibit dominance in of itself, and yet they can be construed to authorize punishment for charging monopoly prices, even though it is a normal and expected behavior of a monopoly.[56] A second reason is that enforcement against exploitative abuse offends a basic tenet of the rule of law[57] that a statute must provide guidance for its compliance if its violation will result in penalties. In Europe, the legal test for exploitative abuse is unfairness, and this concept is never reduced to specific rules or standards, even though a finding of unfairness is punishable by the imposition of a large fine.[58]

A final reason is that American antitrust takes a different view than much of the world on monopoly and monopoly prices. The Sherman Act is predicated on the view that:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[59]

It bears noting that enforcement agencies in countries with abuse of dominance prohibitions use them sparingly against exploitative abuses. They do not regulate monopoly pricing generally, but rather intervene in exceptional cases, usually involving some sort of regulatory gap or failure.[60] Enforcement agencies rarely seek to impose anything like traditional cost-based price regulation, and they often merely try to bring domestic prices into line with those in adjacent countries.[61]

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[56] "[I]t would seem natural to expect a monopolist to charge the monopoly price. Interfering with such a pricing policy would be tantamount to interfere with dominance as such." Nils Wahl, *Exploitative High Prices and European Competition Law—A Personal Reflection in* THE PROS AND CONS OF HIGH PRICES 47, 51 (Swedish Competition Authority 2007).

[57] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214 ("the law must be capable of guiding the behaviour of its subjects" (italics removed)), 218 ("the law should conform to standards designed to enable it effectively to guide action") (2d ed. 2009).

[58] Gregory J. Werden, *Exploitative abuse of a dominant position: A bad idea that now should be abandoned*, EUR. COMPETITION J. (forthcoming).

[59] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[60] *See, e.g.*, Case C-372/19, SABAM v. Weareone.World BVBA, EU:C:2020:598, Opinion of Advocate General Pitruzzella, ¶¶ 22–27; Case 177/16, AKKA/LAA v. Konkurences Padome, EU:C:2017:286, Opinion of Advocate General Wahl, ¶¶ 48–50, 101–06.

[61] *See, e.g.*, Case 177/16, AKKA/LAA v. Konkurences Padome, EU:C:2017:689 (Judgment of the Court of Justice of the Economic Union on reference from a Latvian court approving of efforts to bring Latvian music licensing fees in line with those of Estonia and Lithuania).

F. Importing Law from an Administrative Regime into an Adversarial System

Due to the differing legal frameworks between the U.S. adversarial system and the largely administrative systems enforcing abuse of dominance laws, New York judges confronting a private lawsuit or agency enforcement action alleging abuse of dominance would have to create standards and protections from scratch. In Europe and most countries that have adopted the European model of competition law, an administrative agency has the power to order companies to change their conduct and the power to impose fines. For example, the European Commission regularly imposes multi-billion-dollar fines for violations of competition law. Administrative agency actions under competition law are subject to court review but the courts themselves do not conduct trials, find facts, or craft remedies. Moreover, unlike the U.S. Federal Trade Commission, administrative competition agencies outside the United States do not conduct trial-type hearings.

Although many jurisdictions have abuse of dominance laws, the passage of any of the three pending antitrust bills would make the State of New York the first jurisdiction to adopt an abuse of dominance prohibition in an adversarial system. With the provision already in Section 340 authorizing private damages actions, and the explicit provision of class action relief in all three bills, New York also would become the first jurisdiction to adopt an abuse of dominance prohibition in a regime of private damages litigation. Thus, the passage of any of the three pending antitrust bills would require New York's courts to craft legal machinery essential for civil litigation over abuse of dominance.

New York courts are perfectly capable of doing what is needed, as they have had to do much the same thing with many other laws written by the legislature. But the process takes time, and there is no telling what will come out of it. With every new cause of action, the courts must allocate and calibrate litigation burdens. For every type of potentially abusive conduct, the courts would have to determine what allegations are sufficient to state a claim and what evidence is sufficient to proceed to trial. For cases that get to trial, the courts must determine the legal standards judges or juries use to decide the cases. Because abuse of dominance laws in other jurisdictions are enforced administratively, the case law of those jurisdictions does not address many of the questions that the New York courts will have to answer.

Private commercial litigation presents a challenge quite unlike anything encountered in an administrative system. Businesses bring lawsuits to promote the interests of their shareholders—not the public interest, so Sherman Act cases evolved rules to assure that the public interest in competition is always served. As noted above, courts work to distinguish injuries resulting from the rigors of competition from injuries resulting from the destruction of competition. While distinguishing the two can be difficult, not distinguishing them can be disastrous. If the law protects individual competitors rather than competition, it inevitably does so at the expense of consumers who benefit from low prices and innovation spurred by competition.[62]

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[62] *See* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988) ("[T]he antitrust laws exist to protect the competitive process itself, not individual firms. And, the antitrust laws protect the competitive process in order to help individual consumers by bringing them the benefits of low, economically efficient prices, efficient production methods, and innovation." (citations omitted)).

To assure that the law protects competition rather than individual competitors, administrative systems rely on the judgment of enforcement agencies. Without civil litigation enforcing private rights of action, the courts in jurisdictions with abuse of dominance laws have not had to develop the sort of limiting principles that control antitrust litigation in the United States. If New York were to adopt an abuse of dominance prohibition, its courts would be confronted with private litigation brought by self-interested plaintiffs that stand to benefit at the expense of consumers. The courts could develop rules and standards under an abuse of dominance prohibition much like those developed under the Sherman Act. If they fail to do so, or even hesitate to do so, an abuse of dominance prohibition could become an instrument for suppressing competition rather than protecting it. And if New York law authorizes the award of treble damages for unfair pricing, litigation would explode, and business investment could be redirected to other states besides New York.

G. Recommendation

Section 2 of the Sherman Act allows conduct to be challenged and remedied if it maintains a monopoly, creates a monopoly, or threatens to create a monopoly. In contrast, an abuse of dominance prohibition is applicable only in the first of these three categories. Section 2 of the Sherman Act serves only to protect the competitive process, but an abuse of dominance prohibition could be understood to do other things as well. If New York opts for an abuse of dominance prohibition, it should insert language to assure that it does not become a tool for protecting individual competitors from competition or for regulating prices. As it stands now, S933A and A1812A appear designed to protect individual competitors rather than protect competition.

Furthermore, the precise implications of an abuse of dominance law are unknowable. Indeed, uncertainty is the only certain consequence of adopting such a law. The State of New York should be mindful of the uncertainty it could be creating because uncertainty discourages investment and innovation.

Dissatisfaction with current federal law on exclusionary conduct has spurred legislative proposals in Congress but pinpointing problems and finding corresponding solutions is not easy. New York could contribute to the effort, as it did with the January 1880 report of Special Committee on Railroads of the New York Assembly (chaired by A. Burton Hepburn),[63] which first documented abuses by Standard Oil Company and paved the way for the first antitrust legislation.[64]

IV. Conclusion

The Section appreciates this opportunity to provide its views on the above aspects of S933A, A1812A, and A3399 and is available for any further consultation the New York State Legislature may deem helpful and appropriate.

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[63] A. Burton Hepburn, Chair, Report of the Special Committee on Railroads, appointed under a Resolution of the Assembly to Investigate Alleged Abuses in the Management of Railroads Chartered by the State of New York (1880).

[64] *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 7–8 (2020).