MEMORANDUM IN OPPOSITION

June 7, 2021

S.933A – Gianaris (On Senate Active List, 6/7/21)
A.1812A – Dinowitz (In Economic Development Committee)

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

---

This memorandum in ***opposition*** is written on behalf of our client, the New York Bankers Association (NYBA). NYBA is comprised of small, regional, and large banks across every region of New York State. Together NYBA members employ nearly 200,000 New Yorkers, safeguard $2 trillion in deposits, and extend nearly $70 billion in home and small business loans.

The New York Bankers Association opposes this legislation, which would radically alter New York's antitrust law by increasing penalties, establishing a burdensome state pre-merger notification requirement, and introducing an unpredictable, European-style abuse of dominance standard into New York law without the usual safeguards that prioritize competition and reasonable application of antitrust law.

I. Pre-Merger Notification

The bill contains a first-in-the-nation State pre-merger notification requirement in a new subdivision 10 of GBL § 340. Parties to any transaction valued above a certain threshold will be obligated to notify the Office of the Attorney General (OAG) and wait 60 days before closing the merger. This new standard is worrisome for two reasons: one, it would position New York as an outlier in terms of international norms and best practices in the application of competition law; and two, it only applies to companies subject to the jurisdiction of New York, meaning it could drive out such businesses in marginal cases and those that remain could suffer competitive disadvantages due to the legislation.

The threshold to trigger the merger notification is exceedingly low, approximately $9 million, and just 10% of the corresponding federal threshold. This unreasonably low threshold is entirely out of place in a bill designed to regulate corporate giantism. At that level, the vast majority of the tens of thousands of mergers the requirement sweeps in will present no competitive issues whatsoever. But it will distract the OAG regulators forced to sift through the mountain of notifications for the rare actionable transaction, and it will cost the parties to every transaction excessive compliance fees and valuable time. It also tacks on additional risk by subjecting even pro-competitive mergers to the possibility of a wide-

reaching state investigation that itself can hold-up or torpedo an acquisition. This raises transaction costs further still because the risk exists even if the OAG ultimately concludes there is nothing objectionable.

This notification requirement is also intolerably out of sync with international best practices, especially with respect to the 60-day waiting period. The International Competition Network, a global network of national competition authorities that includes the top regulators from the US, Canada, Mexico, Germany, France, Denmark, United Kingdom and even the European Commission's Directorate General for Competition, recommends a maximum review period of 6 weeks. The federal pre-merger review period is 30 days under the Hart-Scott-Rodino Act, and an early termination mechanism is commonly used to shrink the waiting period to just 10 days. Under this bill, New York would enlarge the waiting period—which is not without costs—anywhere from 30-50 days to accommodate an unspecified review according to untested new standards. Legislators in Albany should consider if it is reasonable to disregard both the bedrock principles of federalism and a hard-won international consensus of regulators.

II. Abuse of Dominance Standard

This legislation would also import an abuse of dominance standard into New York's antitrust law. As written, this standard will threaten any business with a particularly strong position in its local market, meaning it will not menace monopolists so much as harrow local businesses of even modest size. Because the standard is not well understood, and because the legislation intentionally removes many of the safeguards that curb overzealous application of competition law, it will raise compliance costs while prohibiting conduct that is demonstrably pro-competitive.

Since the 1950s, the concept of abuse of dominance has been part of European competition law and enforced in the context of an administrative system ordained by international treaties. There is no precedent that illuminates how it will behave when applied in just one sub-national jurisdiction via a common-law framework. Businesses seeking to comply with such a standard have much to fear but little guidance on how to stay inside the lines, or even where the lines will eventually be drawn.

What guidance can be gleaned from the bill is often contradictory. For instance, the bill enumerates direct evidence that will per se support a finding of abuse of dominance, and therefore it is reasonable to infer that these are the harms the legislation seeks to prevent. These harms include the unilateral power to set prices, standards or non-price contract terms, and the ability to degrade product quality without reducing profitability. By themselves, these seem to envision a business with a market share north of 80%. But the bill also allows litigants to establish abuse of dominance through indirect evidence, such as a business attaining 40% or more market share for sellers or 30% or more for buyers. It is not at all certain that a business with 30-40% market share will be able to perpetrate the anti-competitive acts the bill is designed to punish, and therefore these thresholds should be significantly higher.

SHENKER RUSSO & CLARK LLP

Furthermore, there is a danger that a business may achieve a "dominant position" (as defined by the indirect evidence standards) unintentionally. Consider that the bankruptcy of even one firm in a market with naturally few participants could cause another firm to attain an impermissible market share overnight. That could create legal liability for contractual provisions bargained for before the firm attained dominance which have not expired by the time the market realigns. As written, these evidentiary standards set the risk of a false positive finding of abuse of dominance far too high.

Moreover, the bill limits the defenses available to businesses falsely accused of abusing a dominant position. American anti-trust law has long incorporated a "rule of reason" that allows firms to defend themselves by showing that their conduct had a pro-competitive effect on the market. This bill declares that such a showing should have no value in New York courts. That blunt approach swings the pendulum too far back in the other direction and, by dispensing with the well-established rule of reason, the bill opens the door to decidedly unreasonable applications of its antitrust law. Whereas the current law focuses on harm to competition, this bill would guard against simple harm to competitors, the prevention of which has never been the goal of U.S. antitrust law.

This is doubly dangerous given that the bill's enforcement provisions incentivize smaller rivals to resort to litigation rather innovation. The bill does not limit its enforcement to the OAG or other public authorities who can make deliberate decisions to shape an as-yet undefined standard through strategic litigation. Instead, the bill invites a free-for-all by permitting both private litigation and class actions that will crowd out the OAG's tempering influence. These private plaintiffs will try to broaden the application of the law as far as possible, limited only by the judiciary's appetite for such a distortionary interpretation. Self-interested competitors will employ the abuse of dominance concept primarily as a sword rather than a shield. Similarly, it will inaugurate a bacchanalia of class action suits that will extort settlements and generate attorney's fees while doing little to protect competition.

While this bill has laudable goals, it redraws the landscape of competition law with too broad a brush and blurs the lines between pro-competitive behavior and unfair business practices beyond recognition. For these reasons, the New York Bankers Association **opposes** this legislation.

Respectfully Submitted,

SHENKER RUSSO & CLARK LLP

SHENKER RUSSO & CLARK LLP
P 518-407-5800 · F 518-419-6389
121 STATE STREET, 4TH FLOOR · ALBANY, NEW YORK 12207 · WWW.SRCLAWOFFICES.COM