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ANTITRUST TRADE AND PRACTICE

Modernized Antitrust Laws May Usher In New Era of Enforcement

Legislation under consideration in Albany and Washington, D.C., if enacted, may mark the beginning of a new era of antitrust enforcement. The bills and resulting legislative activity are largely in response to the perceived inadequacy of 20th century antitrust laws to address 21st century issues, particularly those in the technology sector. To that end, lawmakers appear eager to pare down the influence of large companies and ease plaintiffs' (including the government's) burdens in antitrust cases while also permitting enhanced government enforcement action. The resulting legislation, while still far from black letter law and facing steep challenges at the federal level, is indicative of growing wariness by legislators with available antitrust measures in an environment where the antitrust laws and actions are increasingly in the spotlight and increasingly viewed as political football.

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Twenty-First Century Anti-Trust Act (S933A)

In June, the New York State Senate passed the Twenty-First Century Anti-Trust Act. The Act was born out of a "concern for the growing accumulation of power in the hands of large corporations" and seeks "to update, expand and clarify [New York] laws to ensure that these large corporations are subject to strict and appropriate oversight by the state." The bill was still under consideration by the New York State Assembly at the close of the legislative session later that month, but it is likely to be reintroduced in both chambers at the beginning of the next session. If passed and signed into law by the governor, the Act would revamp antitrust law in New York.

Notably, in a significant change for New York antitrust law, the Act would establish a new "dominant position" standard and would impose liability for unilateral conduct by dominant persons and corporations that "abused" their dominant position. New York currently does not prohibit unilateral anticompetitive conduct, and currently has no analog to the federal prohibition of monopolization under §2 of the Sherman Act. The state's antitrust law prohibits only "contract[s], agreement[s], arrangement[s] or combination[s]" in restraint of trade. N.Y. Gen. Bus. Law §340. Under this new Act, if adopted, it would be unlawful for individuals and corporations to "abuse" their "dominant position," and "[e]vidence of pro-competitive effects [would] not be a defense to an abuse of dominance and [would] not offset or cure competitive harm." This standard would represent a departure from both current New York law and the proscriptions on anticompetitive unilateral conduct in §2 of the Sherman Act. The New York bill does not provide an exhaustive list of characteristics and actions that establish a "dominant position," or its "abuse," but it would authorize the Attorney General of New York to enact rules

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implementing the standard and to issue guidance concerning its interpretation.

The Twenty-First Century Anti-Trust Act also differs from its federal counterparts and decades of case law by dispensing with the "relevant market" requirement where "direct evidence is sufficient to demonstrate that a person has a dominant position or has abused such a dominant position." New York antitrust law currently requires identification of a relevant market to state a cause of action. *Watts v. Clark Associates Funeral Home*, 234 A.D.2d 538, 538 (N.Y. App. Div. 1996). But by shedding that requirement, the Act would remove a barrier to potentially prevailing in antitrust actions. This is consistent with the Act's legislative findings, which highlight judicial impediments to antitrust suits as a point of concern.

In keeping with that concern, the Twenty-First Century Anti-Trust Act would explicitly authorize class action antitrust lawsuits and the recovery of treble damages in those suits. In contrast, current New York antitrust law permits class actions in only limited circumstances and effectively prohibits class actions brought by private litigants. *Paltre v. General Motors Corporation*, 26 A.D.3d 481, 483 (N.Y. App. Div. 2006). By expanding the scope of class actions, the Act would further align New York antitrust law with federal law.

In other ways, the Act would supplement federal law, providing an additional level of antitrust scrutiny. For example, the Act would establish a new premerger notification requirement with a significantly lower filing threshold than that currently imposed by the federal Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). Like the HSR Act's Federal Trade Commission and Department of Justice notification requirements, see 15 U.S.C. §18a(a), the Twenty-First Century Anti-Trust Act would require parties to eligible transactions to file notification with the New York Attorney General. In contrast to the HSR Act's typical 30-day pre-closing waiting period, see 15 U.S.C. §18a(b)(1)(B), the proposed legislation would require notification at least 60 days prior to closing. However, the Twenty-First Century Anti-Trust Act would not provide for the extended period of government review permissible under the HSR Act, see 15 U.S.C. §18(e)(2); (g)(2). While state attorneys general routinely participate in federal premerger reviews under the HSR Act, the Twenty-First Century Anti-Trust Act would formalize that participation by requiring parties subject to HSR review to simultaneously file with the New York Attorney General the notification materials they are required to file with the FTC and Justice Department. And like its dominant position sections, the New York legislation's premerger notification provisions would burnish the state attorney general with considerable power to enact "rules and regulations to carry out the purposes of" those premerger review provisions.

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Federal Legislation

The push to empower state attorneys general in antitrust disputes has not been cabined to the halls of Albany. H.R. 3460, the State Antitrust Enforcement Venue Act, would prevent the removal of antitrust cases where a state is a party. In doing so, states would receive the same insulation from unwanted venue changes initiated by the Judicial Panel on Multidistrict Litigation as the United States currently enjoys, see 28 U.S.C. §1407(g).

H.R. 3460, cosponsored by Rep. Kenneth Buck (R-Colo.), David Cicilline (D-R.I.), Daniel Bishop (R-N.C.), Burgess Owens (R-Utah), and Joseph Neguse (D-Colo.), is part of a wave of recent bipartisan antitrust bills under consideration by the House Judiciary Committee following its antitrust subcommittee's months-long investigation last year. While H.R. 3460's impact, if enacted, may prove modest, it is a product of a growing bipartisan consensus among members of Congress concerning antitrust enforcement.

In line with that consensus, the House and Senate recently advanced the Merger Filing Fee Modernization Act of 2021, S.228 and H.R.3843, out of the House and Senate judiciary committees. The bill, with 25 Democrat and Republican co-sponsors between the

House and Senate, would increase filing fees for large mergers subject to the HSR Act and provide hundreds of millions of dollars in increased funding for the DOJ Antitrust Division and the FTC.

Among the more ambitious recently introduced bipartisan antitrust legislation are those bills crafted to combat anticompetitive practices among online platforms. H.R. 3816, the American Choice and Innovation Online Act, would bar many online platforms from advantaging their own products and offerings over other users' and from "discriminat[ing] among similarly situated business users." The bill is intended to increase competition on online platforms by limiting the ability of those platforms to act as retail gatekeepers. If enacted, H.R. 3816 could propel significant changes in how popular online retail platforms display their products and interact with the individuals and businesses which make sales through their platforms. H.R. 3816 would also impose limits on these platforms' ability to use user-generated data to boost their products. Unsurprisingly, these bills have raised alarms among "Big Tech" industry leaders. In a statement, Brian Huseman, Amazon's vice president of public policy, claimed that the bills "would have significant negative effects" for the myriad business owners who sell their products through Amazon and their customers who rely on Amazon to purchase those products.

The legislative concern over data usage similarly animates another recently proposed antitrust measure. H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, would impute an affirmative duty on online platforms to "reasonably secure any user data it acquires" and "to avoid introducing security risks to data or the covered platform's information systems." In line with that data security goal, H.R. 3849 would require platforms "to enable the secure transfer of data to a user, or with the affirmative consent of a user, to a business user at the direction of a user."

Taken together, the data provisions of H.R. 3816 and H.R. 3849 are intended to impose restrictions on the ability of companies to harvest user generated data. However, much of the legislative concern regarding the companies in control of that data has revolved around the consolidation of that data in relatively few entities and the resulting strains on competition. H.R. 3825, the Ending Platform Monopolies Act, seeks to rebut that consolidation by requiring particular entities to divest parts of their businesses. The Act would prohibit online platforms with a market capitalization greater than $600,000,000,000 and with 50,000,000 active U.S.-based monthly users or at least 100,000 monthly active business users from selling product lines which they control and own. While H.R. 3825's proposal to force divestiture and reduce apparent conflicts of interest is reactive, H.R.3826, the Platform Competition and Opportunity Act of 2021, is proactive. That bill would limit the ability of platforms to acquire their competitors and expand their presumed market power.

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Earlier this month, Jim Jordan (R-Ohio), the Ranking Member of the House Judiciary Committee, unveiled a dueling framework for antitrust reform. The proposals, when converted to legislative form, are unlikely to garner the same level of support as the bipartisan measures discussed earlier due to their inclusion of provisions stripping the FTC of enforcement authority and creating a cause of action for companies' perceived censorship of conservative views. The varying levels of bipartisan support those bills have received has reinforced the growing view among legislators that antitrust reform is necessary. All six of these bills have cleared the House Judiciary Committee. While their individual fates are not clear in the House and even more uncertain in the oft-gridlocked Senate, it is apparent that changes in the antitrust realm may come sooner rather than later. Taken together with New York's Twenty-First Century Anti-Trust Act, it is clear that change may come from the state level as well. The breadth of that change will depend on the ability of bicameral majorities to form around the individual proposals and the result of the legal challenges sure to follow.