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New York State Senators Introduce Bill to Expand the Reach of State Antitrust Law

New York State Senators Michael Gianaris and Rachel May have introduced a bill (S. 8700-A) that would expand the reach of New York’s antitrust law and has the potential to create significantly greater liability exposure for corporations doing business in the State—especially tech companies, which are explicit targets of the bill. The bill redefines the nature of antitrust offenses to cover a wide variety of unilateral business conduct by large or “dominant” corporations, potentially adopting standards prevalent in the European Union but not in the United States. The bill would also impose more severe penalties—up to 15 years in prison for individuals (up from 4 years) and fines of up to \$100 million for corporations (up from \$1 million). And, by allowing damages class actions in addition to government enforcement, the bill could give rise to novel private antitrust suits. We summarize below the key aspects and implications of the bill.

1. *Unilateral Conduct and “Abuse of Dominance.”* The bill would add new provisions explicitly addressing unilateral conduct. This includes adding as an offense attempted monopolization, which is already covered under existing federal law. But the bill would also go farther, by making it illegal 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.” The bill does not define “dominant position,” nor does it specify what constitutes an “abuse.” These concepts, which are similar to existing law in the European Union, may (depending on how courts interpret them) extend beyond U.S. law concepts of monopoly power and anticompetitive conduct.

In addition, the bill re-defines an existing term in the law (“arrangement”) as including, but not being “limited to, a contract, combination, agreement or conspiracy.” This approach could render illegal unilateral conduct even by firms that lack monopoly power or a “dominant position” in their industries.

By broadening the scope of unilateral conduct subject to antitrust enforcement, the bill appears to target activities of tech companies, among others. The bill states as one of its justifications: “Powerful corporations, particularly in Big Tech, have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them.”

2. *Increased Penalties and Broader Criminal Enforcement.* The bill also departs from existing federal and state antitrust law by criminalizing a wide range of conduct, including unilateral conduct and mere attempts, and significantly increases the penalties for violations. Criminal enforcement of the antitrust laws at the federal level has long been limited to “hardcore cartel” behavior—e.g., price fixing, bid rigging. Although unilateral conduct and monopolization offenses are technically subject to federal

criminal liability, the U.S. Department of Justice has not prosecuted such offenses criminally for many years. The New York bill, however, would appear to allow for criminal enforcement of any violation of the law, subject to the discretion of the New York Attorney General—including the abuse of dominance provisions discussed above. This would represent a sharp contrast not only to existing U.S. law but also to European law, under which abuse of dominance offenses are not subject to criminal prosecution.

The bill also increases the penalties for violations. Criminal offenses by individuals would be punishable by up to 15 years in prison—an increase from 4 years under existing New York law, and substantially greater than the federal maximum of 10 years. Corporate offenses would be subject to fines of up to \$100 million, whereas current New York law provides a maximum \$1 million penalty.

3. *Class Actions.* Treble damages class actions are not currently available under New York antitrust law, as a result of a New York Court of Appeals decision, *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007). This bill would overturn that rule. Coupled with a potentially broader range of offenses as compared to existing state and federal law, the availability of damages class actions may lead to a significant increase in private antitrust litigation in New York state courts.

In summary, S. 8700-A would transform New York's antitrust law in several important ways. The bill broadens the scope of conduct subject to antitrust enforcement, increases the penalties imposed on individuals and corporations found to violate the law, and may give rise novel class action lawsuits. These changes could significantly increase the liability exposure of large corporations doing business in the state.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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