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CLIENT MEMORANDUM

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New York Legislation Could Expand State Antitrust Law Significantly

- If enacted into law, proposed New York legislation would impose an unprecedented state-level pre-merger notification regime and a waiting period requirement longer than that mandated under federal law.

- The proposed legislation would also markedly expand the state's antitrust law by establishing new offenses for monopolization and abuse of dominance, allowing plaintiffs to bring class actions for treble damages and increasing and expanding criminal liability for certain offenses.

During its last legislative session, the New York Senate passed the Twenty-First Century Anti-Trust Act, which, if enacted, would have amended the Donnelly Act, New York's antitrust statute. While the bill did not come to a vote in the Assembly before the session ended, one of the bill's sponsors has indicated that it may be re-introduced in the next session. This is the second time in recent years that a bill was introduced to amend the Donnelly Act, and this iteration is more expansive than the prior proposal, which we discussed in a prior memorandum. If this or similar legislation were to become law, it would significantly expand New York's antitrust law and could expose companies subject to the state's jurisdiction to increased legal risk and potentially onerous pre-merger reporting requirements.

The Proposed Legislation

The legislation would expand New York's antitrust law in four principal ways, by: (i) imposing state-level pre-merger notification and waiting period requirements; (ii) allowing private litigants, including indirect purchasers, to bring class action antitrust claims for treble damages; (iii) increasing and expanding criminal penalties for antitrust offenses; and (iv) adding causes of action for single-firm monopolization and abuse of dominance.

Pre-merger Notification and Waiting Period

Currently, no U.S. state has a comprehensive antitrust pre-merger notification requirement. The proposed bill would establish a sweeping and unprecedented state-level pre-merger notification and waiting period requirement for proposed transactions which are otherwise not exempted. The federal Hart-Scott-Rodino (HSR) Act requires parties to proposed transactions to notify the federal antitrust agencies of deals which meet certain dollar-amount thresholds. The proposed New York legislation would require notification to the state attorney general for deals meeting thresholds set at a small fraction of the federal thresholds, substantially expanding the scope and timeline of merger reviews from the existing federal merger review framework. For example, the proposed New York bill could require notification of transactions valued at as little as $9.2 million (based on 10% of the current $92 million size-of-transaction threshold under the HSR Act), if the acquiring or acquired person has assets or annual net sales within New York state in excess of $9.2 million (based on 2.5% of the current $368 million threshold under the HSR Act).

The required notification would include information related to the parties to the transaction, the assets to be acquired and the anticipated closing date. In addition, parties subject to the state's notification requirements who make an HSR filing with the federal antitrust agencies would be required to file the same materials under the HSR Act with the New York attorney general. HSR filings include, among other things, certain confidential company documents analyzing the transaction's impact on competition and transaction-related synergies. HSR filings are exempt from disclosure under the Freedom of Information Act, thus federal antitrust agencies cannot under current circumstances share copies of HSR filings with other federal or state agencies without the parties' consent. Under the proposed legislation, New York's attorney general would automatically receive the same materials the parties provide to the federal antitrust agencies under the HSR Act. Given the number of mergers that would require a state filing, the resources required for the Office of the Attorney General to review the materials would be quite significant, but at present the office's Antitrust Bureau has a relatively small staff.

The bill would impose a sixty-day waiting period prior to closing, and the text of the legislation has no provision for the attorney general to grant an early termination of that period. (By contrast, the HSR Act imposes a thirty-day waiting period and parties are able to request early termination of this period; however, the federal agencies have granted only three such requests since they announced a suspension of the practice in February.) Entities which fail to adhere to the notification requirement are subject to a penalty of ten thousand dollars per day.

In contrast with the HSR Act, it is possible that fewer exemptions from notification would apply under New York's proposed regime. Proposed exemptions would include ordinary course acquisitions of goods or realty, acquisitions of "obligations which are not voting securities," "transfers to or from a federal agency or a state or political subdivision thereof" or transactions exempted by regulations promulgated by the attorney general.

Monopolization and Abuse of Dominance Causes of Action

The legislation would make it "unlawful for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in" New York state. This would add to New York law a provision similar to the federal law's longstanding prohibition on monopolization, and would explicitly include the concept of monopsonization. (Monopolization deals with supplier power, while monopsonization deals with buyer power.) Current New York state antitrust law targets multi-firm conduct, i.e., a "contract, agreement, arrangement or combination" of multiple entities to restrain trade. The proposed legislation would additionally outlaw single-firm monopolization conduct.

Separately, the bill would make it illegal for an entity to abuse its dominance. The legislation provides that "abuse of a dominant position may include, but is not limited to, conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors." With respect to labor markets, "abuse may include, but is not limited to, imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or restricting the freedom of workers and independent contractors to disclose wage and benefit information." Evidence of procompetitive effects would not be available as a defense.

An entity's dominant position could be proven by direct or indirect evidence, and if direct evidence is "sufficient," a plaintiff would not have to define a relevant market. Direct evidence includes evidence that an entity has "the unilateral power to dictate non-price contractual terms without compensation; or other evidence that a person is not constrained by meaningful competitive pressures, such as the ability to degrade quality without suffering reduction in profitability." With respect to labor markets, an entity's dominant position could be proven by "the use of non-compete clauses or no-poach agreements, or the unilateral power to set wages." Indirect evidence "such as . . . market share" could also be used to establish an entity's dominant position. Quite significantly, the bill would presume that a company has a dominant position if it "has a share of forty percent or greater of a relevant market as a seller" or "thirty percent or greater of a relevant market as a buyer."

The abuse of dominance violation is significantly broader in scope than the current federal monopolization violation. For example, federal law defines monopoly power, generally speaking, as "the power to control prices or exclude competition" and requires the definition of a relevant market in order to evaluate whether a firm possesses such power, along with proof of exclusionary conduct. Furthermore, the market share thresholds in the proposed New York law are much lower than the thresholds for establishing monopoly maintenance under federal law, where courts generally require a market share of at least

70 percent. And the examples of conduct provided in the statute are broader that what is captured by federal law. Indeed, the proposed New York legislation is perhaps closer to European Union law than it is to United States federal law. Moreover, by not allowing an efficiency defense, the bill implicitly makes abuse of dominance illegal *per se*. All a plaintiff would have to do is prove (through direct or indirect evidence) that a defendant has a dominant position and that it engaged in conduct to abuse that position. A defendant would not be allowed to argue that its conduct had procompetitive effects offsetting any anticompetitive effects. As with existing New York antitrust law, the legislation potentially affects any national or multinational company subject to the jurisdiction of the New York courts that conducts "business, trade or commerce" or furnishes "any service in" the state.

Antitrust Class Actions

Existing law allows the government "or any person who shall sustain damages by reason of any violation of" the Donnelly Act to bring an action to recover treble damages. However, treble damages *class* actions are not currently available under New York antitrust law as a result of the New York Court of Appeals' decision in *Sperry* v. *Crompton Corp.*, 8 N.Y.3d 204 (2007). In a very significant change to the law, the bill would allow treble damages class actions for Donnelly Act violations. This is particularly notable given the substantive scope of the law because New York allows indirect purchasers to bring damages clams, thus expanding the universe of potential plaintiffs. This is in contrast to federal antitrust law, which bars indirect purchaser damages claims under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

Criminal Penalties for Antitrust Offenses

The proposed legislation would increase criminal penalties for violations of the existing law with respect to agreements in restraint of trade and would additionally make the new monopolization offense subject to these increased criminal penalties. If the bill were to become law, these penalties would be a maximum fine of one million dollars (an increase from one hundred thousand dollars) and imprisonment for four years. The potential for criminal liability for monopolization is extraordinary. While federal law – based on a statute from 1890 – does make monopolization a felony, it has been the very longstanding policy of the U.S. Department of Justice not to bring criminal monopolization cases. (Indeed, until recently it was rare for the federal government to bring civil monopolization cases.)

Significance

If the Twenty-First Century Anti-Trust Act were to become law, companies doing business in the state could face the risk of significantly increased antitrust liability. Even companies with market shares as low as forty percent (as a seller) or thirty percent (as a buyer) could face claims for "abuse of dominance," and these claims (and others) could be brought in state court class actions seeking treble damages. This would be an unprecedented expansion of state-level antitrust law and would capture conduct well outside that which is prohibited under current federal law.

Additionally, by requiring notification and a sixty-day waiting period, the imposition of the proposed state-level merger notification and waiting period framework could have significant effects on deal-making, even for deals of a small size and even for companies with only relatively modest sales within New York 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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