The Business Council

Testimony to

New York State Senate Standing Committee on Consumer Protection

"The Twenty-First Century Antitrust Act (S.8700)"

Presented by

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and

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The Business Council is the state's largest statewide employer advocacy organization, representing 2,400 private sector employers – large and small, in all sectors, across the entire state. These businesses employ in excess of one million New Yorkers. Our prime mission is advocacy on key legislative and regulatory issues impacting New York State's private sector employers. In doing so, we often address issues impacting the state's economic competitiveness.

It is important to recognize that The Business Council and our members are committed to promoting vigorous competition among businesses and the just and effective enforcement of antitrust laws.

However, we are here today to express our serious concerns regarding S.8700 and its dramatic expansion of the state's antitrust law, known as the Donnelly Act (Article 22 of the state's General Business Law.) We believe this legislation will be damaging to business and consumers alike and is an unnecessary expansion of the state's antitrust statute.

This legislation would make significant amendments to the state's General Business Law's provisions regarding perceived monopolies. Its key provisions would:

- extend current Donnelly Act provisions to single firm activity and subject those activities to criminal enforcement.

- create a new category of unlawful behavior applicable to any entity that *abuses* a *dominant position* in any business or trade, without providing any meaningful definition of these key terms;

- allow private party claims for damages to be recovered through class action suits;

- substantially increase the Act's criminal penalties, so that any act deemed unlawful would constitute a class C felony (rather than a Class E felony), with imprisonment up to fifteen years (up from four years) and fines up to $1 million for an individual (increased from $100,000) and up to $100 million for a corporation (up from $1 million.)

- extend the statute of limitation for criminal prosecution from three to five years.

While the bill's focus is clearly on the technology sector, its provisions are not limited to any specific category of business. In fact, we have heard significant concerns about this legislation from Business Council members is a wide range of industries, including technology, telecommunications, pharmaceutical, financial services, manufacturing, and others.

This legislation would result in an extraordinary expansion of the state's antitrust law, and depart from federal law is key areas, would create tremendous uncertainty for businesses as to what constitutes lawful and unlawful business conduct in New York, and would lead to unintended adverse consequences for businesses and consumers alike, and, as a result, for the state's overall economic climate.

Our key concerns about the potential adverse impact of this legislation include the following:

- It significantly increases criminal penalties for business practices that are not criminal under federal law nor the laws of other states, while at the same time creating significant uncertainly by providing no criteria, parameters or limitations on what business activities constitutes an abuse of a dominant market position." As result, businesses will be discouraged from engaging in or expanding business activities in the state.

- The undefined standards in this legislation will open the door to the Attorney General and private litigants to challenge a wide range of business practices that *benefit* consumers, since its newly proposed "abuse" provisions fails to require consideration of actual harm to consumers with regard to prices, output or quality of products and services.

- Its vague "abuse of dominant position" provisions will have a chilling effect on common business activities that provide substantial benefit to consumers. Consider the example of first to market innovators, such as a small, emerging biopharmaceutical firm with a breakthrough treatment technology. A third party could claim that the firm has both a dominant market position (as both the specific market, and the share of that market that constitutes dominance can be defined by the plaintiff), and is abusing that power though its pricing practices (again, with "abuse" being left to a plaintiff to define.)

- Antitrust laws historically have focused on consumer welfare and protecting the competitive process and not individual competitors. By focusing on a business' "dominant position," we are concerned that the amended law would be applied against business which a third party believes is simply "too big." This focus on "big business" is contrary to the state's economic interests. Based on recent U.S. Census economic data, while only 1 percent of the state's 465,000 private sector firms employ more than 500 employees, those "big businesses" account for over 50 percent of all private sector jobs in New York State, and almost 60 percent of all private sector payroll.

- The significantly enhanced criminal provisions, and the potential for class action claims, will apply tremendously increased leverage against a business who believes its business practices are recognized as legal in most U.S. jurisdictions.

As a final point, we do not see a compelling need for this legislation. The types of concerns cited in the sponsor's memo, and raised by sponsors in recent media reports, have been and are being pursued (rightly or wrongly) under existing antitrust laws. State attorneys general are active participants in these investigations and actions. The real change that this legislation would bring about is the "tipping of the scales" in antitrust enforcement in favor of the state (and private litigants and the accompanying plaintiff attorney fees) and to bring significantly increased leverage against targets of antitrust actions.

Our detailed discussion of the provisions of this legislation, and our concerns about its adverse impact on New York State business and economic competitive, is provided below.

As always, we greatly appreciate the opportunity to provide input. We look forward to any questions or comments you have today and welcome the opportunity to have further discussions on this issue with you and your legislative colleagues.

TEXT OF MEMO IN OPPOSITION TO S.8700

Existing Article 22 of the General Business Law (also referred to as the Donnelly Act) was adopted in 1899, modeled on the federal Sherman antitrust act. It bans contracts or other forms of agreements that either result in a monopoly "in the conduct of any business or in the furnishing of any service, or that restrains trade" or that otherwise result in a constraint of trade. Through amendment and more than a century of judicial interpretation, the Donnelly Act has come to follow closely the federal Sherman Act.

Today, modern application of antitrust law is focused on addressing anti-competitive conduct and its impact on consumers.

In contrast, this proposed legislation would apply significantly increased criminal penalties to violations that constitute the "abuse" of a "dominant position" in the conduct of any business or commerce – key terms that are undefined in the legislation. While it is important for antitrust laws to be enforced against anti-competitive conduct, the resulting vague and broad provisions of this bill would allow enforcement and penalties against business conduct that is clearly pro-competitive and results in consumer benefits. The bill would also significantly expand the opportunity to bring cases under the Donnelly Act, by authorizing private class action suits for the recovery of damages.

As an association representing 2,400 businesses in a wide range of industry sectors, The Business Council understands and supports the importance of our antitrust laws in helping to promote healthy competition in our free market. The protection provided to markets by antitrust laws has fostered economic growth and innovation, allowing consumers to benefit from higher quality products and better services, all at lower prices.

The system works well. Historically, antitrust laws have been narrowly written and applied, and have focused on protecting consumers from anti-competitive actions. Even so, current federal and state antitrust laws remain actively enforced, and their core principles have been adapted to apply to new types of industries and markets.

In contrast, this proposed legislation would result in a dramatic change to the Donnelly Act, and provide expansive authority for both the Attorney General and private plaintiffs to bring cases in response to market activities they disfavor.

The bill provides no guidance as to what constitutes a "dominant position," nor does it provide any specifics on what would constitute the abuse of such position.

Attacking a dominant firm that earned its dominance by outcompeting its competitors, punishes success and usurps the power of consumers to pick winners and losers in the market. Further, to suggest a successful firm is abusing its prominent role in the market is often an allegation made by a competitor, but without demonstratable harm to the consumer it should not give rise to an antitrust concern. Companies should be incentivized to compete to win market share and encouraged to compete aggressively by offering innovative product or services.

As important, the implications of these proposed changes do not solely target “big business”. Businesses of all sizes can be viewed as holding a “dominant position” depending on how the market is defined. A narrow market definition can make a small or medium sized business dominant allowing a plaintiff to argue that business is dominant in its market and its conduct is abusive.

Antitrust enforcement today appropriately places consumers at the heart of the law. This legislation would move away from that standard as it does not require any showing of potential or actual harm to consumers arising from the business conduct in question. In fact, contrary to existing federal and state antitrust statutes, aimed clearly at assuring market competition for the benefit of consumers, this legislation seems to provide protection to other market participants, including those impacted by more successful competitors. As the U.S. Supreme Court has said in United States v. Grinnell Corp., 384 U.S. 563 (1966), the purpose of antitrust law “is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.” Consumers are the main beneficiaries of competition, and antitrust is intended to protect them from business conduct that damages such competition.

The bill also dramatically increases the applicable criminal penalties. For a natural person, the criminal penalty is increased from a Class E to a Class C felony, increasing the potential imprisonment from four to fifteen years and increasing the maximum fine from $100,000 to $1 million; for incorporated entities, the maximum fine is increased from $1 million to $100 million.

Clearly, these penalty levels are not only a deterrent against illegal act. They also provide significant leverage against a defendant whose only “crime” was to outperformed their competitors, but which would facing ruinous criminal penalties under this vaguely worded proposal.

As stated by the sponsors, this push is intended to go after large technology companies, but its impact will be felt across all business sectors. Such broad powers held by state antitrust enforcers would provide enormous leverage over all categories of business and could dictate specific outcomes in each sector of the economy, giving the state the ability to pick winners and losers among competing businesses.

The Business Council is committed to promoting vigorous competition among businesses in our economy and the just and effective enforcement of current law. Antitrust is not regulation. Antitrust is about ensuring market forces determine market outcomes. In contrast, regulation is a conscious decision to steer specific outcomes in the market. Efforts to change the antitrust law in New York should not alter antitrust into a tool to steer market outcomes. The Donnelly Act has served the state well and remains adequate to address this important public policy concern. However, we believe that this legislation would serve to undermine competition rather than enhance it, by creating and applying new, undefined criteria to regulate market behavior.

For these reasons, we strongly oppose adoption of S.8700/A. 10870.