



1133 Westchester Avenue, Suite S-217
White Plains, NY 10604
www.westchester.org

MEMORANDUM IN OPPOSITION

March 10, 2022

To: Members of the Hudson Valley Delegation of the New York State Legislature; Sen. Michael Gianaris, Assemblyman Jeffrey Dinowitz, Assemblyman Harry Bronson
From: Michael N. Romita, President & CEO of the Westchester County Association
Re: S.933-A (Gianaris) / A.1812-A (Dinowitz)- Twenty-First Century Anti-Trust Act

BILL SUMMARY: This bill would enact the Twenty-First Century Anti-Trust Act

The Westchester County Association (“WCA”) is a professional membership organization comprising a diverse group of businesses and nonprofits that rely on us to advocate for policies and laws to foster economic development in the region and meet the needs of our communities. The WCA’s members include hundreds of the region’s foremost organizations in industries as diverse as healthcare, real estate, finance, law, energy, technology, hospitality, and higher education which collectively employ hundreds of thousands of workers.

The WCA opposes the Twenty-First Century Anti-Trust Act. This legislation vaguely and inaccurately broadens the definition of anti-competitive conduct in a way that is extremely detrimental to businesses and consumers.

Existing law under Article 22 of the General Business Law (referred to as the Donnelly Act) was modeled after the federal Sherman Antitrust Act and has served New York State business and consumers well for many years. No compelling interest exists for a change in the law. Article 22 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”. Current applications of this law have successfully addressed anti-competitive conduct and its impact on consumers.

In contrast, the proposed legislation far exceeds the scope of any federal or state anti-trust standard and will place New York at a competitive disadvantage. It places penalties and restrictions on businesses of all sizes for a poorly defined “abuse of a dominant position”. In addition, it expands enforcement beyond traditional government authorities to private parties. This novel and untested enforcement approach would create a multitude of “private attorneys general” and has the potential to cause a flood of class action litigation against proposed businesses transactions based on a vague and untested standard.

While this proposed legislation will negatively impact *all* businesses, it is especially problematic for the healthcare sector. The healthcare sector in the mid-Hudson region is by far the largest economic driver, employing well over 50,000 people and providing \$18 billion in annual economic impact.

Particularly problematic provisions are:

- **Dominant Position Definition-** The proposal to broaden this definition includes the use of non-compete and no-poach clauses in employment agreements. The proposed legislation would consider any entity that employs such clauses as evidence that it holds a dominant position. These clauses are widely used in healthcare and research fields to protect investment in research and development and would inhibit the ability to attract top-tier talent to New York. Additionally, applying the “abuse of dominant position” criteria under this legislation to healthcare institutions would prohibit hospitals and health systems from employing widely accepted practices which are necessary to ensure the quality and efficiency of care provided. This shift away from decades of healthcare policy at the state and federal levels will worsen clinical outcomes and increase costs to both consumers and publicly funded programs including Medicaid. Many reimbursement rules from payers are tied to quality and efficiency metrics which will suffer as a result of this proposed legislation, having a direct impact on hospital finances at a time they can least afford it.
- **Pre-Merger Notification-** Under this legislation, notification to the State Attorney General would be required for any proposed merger or acquisition valued at \$9.2 million or more -- one tenth of the federal thresholds. The volume of pre-merger notifications applies to all businesses and will likely overwhelm the AG’s office and lead to substantial delays in transactions. This first in the nation requirement will create a even greater burdens on business transactions and disincentivize business growth throughout the State. From a healthcare perspective, the expansion of this pre-merger notification and approval would extend to entities as small as a sole physician’s practice.
- **Impact to Consumer Benefits-** The legislation explicitly states that the pro-consumer benefits of an existing arrangement are not an allowable defense of that arrangement in circumstances where an entity has a “dominant position” in the market. This provision would, for instance, prohibit a larger health system taking over a struggling facility that otherwise would be forced to shut down and leave patients in that market with less access to care.

The Twenty-first Century Anti-Trust Act will serve as a deterrent to business growth in this state. In particular, it would destabilize the healthcare industry when they can least afford it while simultaneously jeopardizing access to quality healthcare services for our residents and businesses.

For these reasons, the Westchester County Association strongly opposes this legislation.