



Computer & Communications  
Industry Association  
Tech Advocacy Since 1972



January 26, 2022

The Honorable Andrea Stewart-Cousins  
President Pro Tempore and Majority Leader  
New York State Senate  
172 State St.  
Albany, NY 12210

**RE: CCIA comments in opposition to S 933A, The Twenty-First Century Antitrust Act**

Dear Senate Leader Stewart-Cousins and Members of the Senate:

On behalf of the Computer & Communications Industry Association (CCIA),<sup>1</sup> I write to reiterate the Association's opposition to S 933A, the Twenty-First Century Antitrust Act. CCIA expressed concerns regarding this bill during the 2021 legislative session,<sup>2</sup> and given it has not been sufficiently amended, we remain in opposition due to the chilling message it would send to the state's business community writ large.

New York is at the forefront of innovation, with numerous indices citing New York City as one of the most innovative in the world. The city's startup ecosystem alone is valued at \$189 billion.<sup>3</sup> Competition is a fundamental driver of the State's success on this front. The competitive process incentivizes firms to continue investing in innovation that allows them to develop higher quality goods and services at a lower price—all to the benefit of consumers.

However, we believe the Twenty-First Century Antitrust Act threatens to stifle the competitive process, resulting in significant harm to consumers. Further, while it is imperative that New York lawmakers focus on attracting investment to recuperate revenue lost as a result of the COVID-19 pandemic, this bill threatens to deter companies from seeking business opportunities in the state.

CCIA has identified the following concerns regarding the impact of S 933A on marketplace competition and the economy, and we encourage the Senate not to move forward with this legislation.

**1. Uncertainty surrounding the “abuse of dominance” standard and high penalties create compliance challenges that could deter pro-competitive business activity.**

S 933A authorizes the Attorney General to “adopt, promulgate, amend, and repeal” guidance surrounding conduct that constitutes an “abuse of dominance”, for which there is no existing federal U.S. legal precedent.

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<sup>1</sup> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit [www.ccianet.org](http://www.ccianet.org).

<sup>2</sup> Computer & Communications Industry Association, Comments in opposition to S 933A, The Twenty-First Century Antitrust Act (May 27, 2021),

<https://www.ccianet.org/wp-content/uploads/2021/05/2021-27-05-CCIA-Comments-on-New-York-Antitrust-Gianaris.pdf>.

<sup>3</sup> Startup Genome, *Why you Should Invest in New York City*, <https://startupgenome.com/ecosystems/new-york-city> (last visited Jan. 18, 2022).

The failure to define key terminology upfront results in ambiguity, creates a moving target for enforcement, and poses significantly greater legal uncertainty for companies operating in the state. This would have significant implications for New York's business environment and could have a chilling effect for engagement in what is otherwise vigorous competition among firms.

Many entrepreneurs launch a business with the intention of eventually being acquired by another company. Ambiguity surrounding S 933A could undermine these efforts by creating an environment of uncertainty for both parties. Without adequate definitions, acquiring companies will have no method to determine if a proposed transaction or practice violates this standard, leaving them hesitant to acquire startups for fear that doing so may be deemed to meet the threshold for "abuse of dominance". Conversely, firms encountering potentially objectionable behavior in the marketplace will have no certainty as to what practices are in fact impermissible.

In addition, the increased severity of penalties under S 933A would have a chilling effect on business investment. The bill raises monetary penalties for individual offenders from \$100,000 to \$1 million, and increases fines for corporations from \$1 million to \$100 million. The drastic increase in penalties alone sends a threatening message to businesses of all sizes operating in the start-up ecosystem .

Finally, uncertainty surrounding business transactions and severe new penalties create a strong disincentive for companies to do business in the state. This is especially concerning during a time when the state is struggling with unemployment<sup>4</sup> and many companies are exploring opportunities to relocate from New York to jurisdictions with more business-friendly policies.<sup>5</sup>

## **2. Shifting toward an EU-based model is likely to hamper innovation.**

In order to guide enforcement related to the abuse of dominance standard, it is likely that the Attorney General will look to the European Union, where this standard is a cornerstone of EU competition law and has led to overenforcement of competition for several decades. In the EU, a company is presumed to hold a dominant market position with just 39% of a market share. In this position, they are required to abide by unique guidelines that restrict their ability to grow and thrive. In contrast, under existing U.S. federal antitrust law, "dominance" requires a more meaningful market share evaluation and fact specific analysis. As a result, the U.S. has seen rapid innovation and a thriving business environment.

Further, under the EU's abuse of dominance provisions, the ultimate goal of competition law is to maintain a competitive playing field. Alternatively, the U.S. approach focuses on enhancing consumers' welfare, as opposed to protecting one competitor from another. The U.S. approach recognizes that when businesses battle it out for consumers' attention, the consumer wins. When competitors are induced not to compete too aggressively, consumers, and even other businesses lose as economic growth deteriorates. Application of the European approach in New York will likely lead to decreased competition and innovation in all sectors to the detriment of both consumers and New York's innovation economy.

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<sup>4</sup> James Parrott, *New York's unemployment crisis stands out among all states; job opportunities evaporate for thousands of young city residents*, The New School (Jan. 13, 2022), <http://www.centernyc.org/reports-briefs/new-yorks-unemployment-crisis-stands-out-among-all-states-job-opportunities-evaporate-for-thousands-of-young-city-residents>.

<sup>5</sup> Jack Kelly, *Wall Street banks and tech companies are fleeing New York and California*, Forbes (Dec. 14, 2020), <https://www.forbes.com/sites/jackkelly/2020/12/14/wall-street-banks-and-tech-companies-are-fleeing-new-york-and-california/>.

### 3. The proposed merger notification requirement creates unnecessary hurdles for companies.

S 933A introduces a unique pre-merger notification requirement which obligates companies to notify the Attorney General 60 days in advance of any transactions in the state through which the acquiring company would hold voting securities and assets of more than ten percent of the current thresholds specified by the FTC. In contrast, under existing federal law, merger transactions of \$92 million and higher are reportable to the FTC and DOJ under the federal Hart-Scott-Rodino Act (HSR)<sup>6</sup>. Notably, preliminary reporting by the FTC indicates that in 2020, more than two thousand transactions were flagged under the considerably higher HSR threshold.<sup>7</sup> S 933A's merger notification requirement creates a duplicative review process that significantly expands the volume of reportable transactions compared to federal law. This requirement could result in delayed transactions<sup>8</sup> and burden the AG's office with cases for review without any related benefit to consumers. These hurdles would contradict the state's "business friendly" message.

Across the country, jurisdictions are developing strategies to attract tech companies and expand employment opportunities in order to kickstart local economies. It is critical that lawmakers communicate their effort to adopt policies to help nurture small businesses to grow New York. Unfortunately, the message S 933A sends to the sector is quite the opposite.

### 4. Conflicting laws across jurisdictions pose barriers for business decisions.

Businesses are increasingly operating across state lines and in doing so, are tasked with navigating complex compliance regulations. New rules posed by S 933A would only add to the complicated nature of already difficult considerations companies face when seeking to expand or move across state lines. Rather than a patchwork of legislation across jurisdictions, a uniform, evidence-based national approach is preferred.

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While CCIA's primary focus is to promote competition in the technology sector, our experience tells us that sweeping regulations such as S 933A would impact the business community writ large. We strongly advise against adopting broad new policy changes that will likely lead to unintended consequences for all sectors of the economy, and instead focus on adopting data-driven solutions to help attract business and spur economic growth that benefits all New Yorkers. We appreciate your consideration and stand ready to provide additional information and perspective as the Senate considers this bill.

Sincerely,

Matt Schruers  
President  
Computer & Communications Industry Association

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<sup>6</sup> 15 U.S.C. § 18a.

<sup>7</sup> Federal Trade Commission, *Premerger Notification Program*, <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited Jan. 18, 2022).

<sup>8</sup> Perry Lange, Brian Mahanna, Alvaro Alonso, *Developments in Antitrust Law: Keep an Eye on New York*, WilmerHale (Mar. 5, 2021), [https://www.wilmerhale.com/-/media/files/shared\\_content/editorial/publications/wh\\_publications/client\\_alert\\_pdfs/20210305-Developments-in-Antitrust-Law-Keep-an-Eye-on-New-York.pdf](https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20210305-Developments-in-Antitrust-Law-Keep-an-Eye-on-New-York.pdf).