



## Analysis of State-Level “Abuse of Dominance” Antitrust Legislation and its Relevance to Small and Midsize Businesses

Several U.S. states are currently considering unprecedented antitrust legislation that goes below the long-held “consumer welfare standard” of monopolies (which uses objective economic analysis and empirical evidence) to a reduced and more vague “dominance” standard. While different states are considering different legislation, and their bills are subject to change, generally speaking, under this legislation it would become illegal for a company to (a) obtain a “dominant position” in a market, which would be presumed to exist when a company reaches an arbitrary, and below-majority, market share, and (b) “abuse” such a dominant position, which is defined very broadly. Collectively, we term this approach state-level “Abuse of Dominance” (AOD) antitrust legislation.

For example, in May 2023, New Jersey state legislators introduced a bill ([S3778](#)) to amend the state’s existing Antitrust Act that declared, “It shall be unlawful for any person with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this State to abuse that dominant position.” A current list of such proposed state legislation is provided in Table 1.

**Table 1. Summary of Proposed “Abuse of Dominance” Legislation at the State Level**

State	Bill	Intro Date	Bill Information
NJ	<a href="#">S3778</a>	May 2023	Amends "New Jersey Antitrust Act" to make monopsony illegal and regulate entity in dominant position in market
NY	<a href="#">S6748</a>	May 2023	Relates to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade, and authorizes a class action lawsuit in the state anti-trust law
ME	<a href="#">No. 1815</a>	April 2023	An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers
MN	<a href="#">HF 1563</a>	Feb 2023	A bill for an act relating to trade regulations; prohibiting abuse of dominance
CA	<a href="#">B-750*</a>	Nov 2022	Antitrust Law - Study B-750 (*note this is not a “bill” but the CA Legislature authorized the CA Law Revision Commission to study the issue formally)
PA	<a href="#">HB2677</a>	June 2022	Pennsylvania Open Markets Act: An Act providing for cause of action for antitrust conduct, for indirect purchaser recovery under State antitrust laws and for premerger notice of health care mergers and transactions; and imposing criminal penalties

Such AOD legislation aims to promote a diverse, competitive economy by preventing within-state monopolies. While those in the state legislatures promoting such bills understandably wish to help the business community, broadly, these proposals, as written:

- Harm businesses by creating vague and confusing state business environments through arbitrary market share thresholds that define “dominance.”
- Harm competition (which the bills are meant to protect) via a predicted increase in frivolous complaints by companies to regulate their competitors, rendering impotent the instruments and strategies companies normally use to compete in the free market.



- Harm consumers through a patchwork of antitrust laws that offer disincentives for businesses to operate in states that employ AOD regulations.

Because 99% of U.S. businesses are small- and medium-sized businesses (SMBs), every issue is a small business issue. This is true for state AOD legislation, as many SMBs conduct a good deal of their activities within the state where they are based. While not exhaustive, DCI has outlined the major challenges of such legislation to SMBs in states governed by AOD-style legislation. In sum, these bills would cause extensive uncertainty and unintended consequences that would disadvantage SMBs in many ways.

## 1. SMBs, Despite Their Small Size, Could Be Declared “Dominant” in Arbitrarily-Defined “Markets”

**Cause:** The notion that SMBs are too small to be dominant is based on a traditional view of “markets” being large. But because markets are arbitrarily defined under AOD regulations, virtually anything could be defined as a “market” within which “illegal dominance” may be taking place by state law enforcement or by competitors in the media to stir up trouble. Markets could be defined by geography, very specific product types, customer profiles, etc. (As a precedent of sorts, in 2022, the Federal Trade Commission (FTC) attempted to stop Meta from buying an SMB ([Within](#)) and becoming dominant in a “[virtual reality fitness apps](#)” market.)

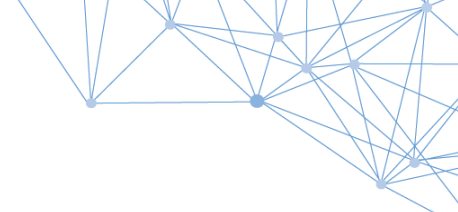
**Examples:** An SMB successfully entering a new market or defining a new market it created could be found to have “first-mover dominance.” Or, if an SMB is very popular within an underserved market, it could be found to be “naturally dominant” (as it would have little to no voluntary competition).

**Systematic Effects:** State AOD-style regulation, through arbitrary market definitions, would hurt SMBs in several ways, including (a) SMBs leaving the state or reducing sales/services there to reduce risk if they assess that they are in danger of exceeding a dominance threshold under a new AOD regulatory regime; (b) reducing the number of legitimate mergers and acquisitions (M&A) deals involving SMBs for fear of hitting a “tripwire” for being dominant; (c) reducing new firm formation because of diminished prospects of a viable “exit strategy” (i.e., selling the business); (d) endangering SMBs that benefit specific communities, such as healthcare and family services (clinics, daycare, etc.) and even services as diverse as dairy farms, waste management, and bail bonds, where there are localized concentrations of only a few SMB providers.

## 2. SMBs Under AOD Regulations Will Face Higher Costs of Doing Business

**Cause:** Under AOD regulations, SMBs will face higher costs of doing business because the suppliers of “input” services that SMBs use or purchase will be under intense scrutiny (such input services include, for example, employee healthcare, shipping and logistics, and manufacturing). Many companies that provide such input services to SMBs are likely to fall under the vague definition of being “dominant.”

**Examples:** Companies selling input services to SMBs will no longer be able to offer bundled or discounted services, such as those that support SMB benefits (e.g., healthcare, insurance), exclusive distribution deals (e.g., a meat supplier to a restaurant, or farming equipment to a family farm), or those that allow for volume discounts in shipping/logistics. Further, SMBs that utilize major tech platforms (which suddenly become “dominant” in their state) may see the higher costs of such regulation passed down to them, the customer.



**Systematic Effects:** State AOD-style regulation, through increasing legal and compliance costs to operate in the state, would hurt SMBs in several ways, including increasing the regulatory burden of operating an SMB in the state through more lawsuits and government filings, in turn increasing costs and taking valuable time away from actually operating a business. In addition, AOD-style regulation will lead to increased input costs as health care, manufacturing, and logistics providers that naturally operate with economies of scale will be under scrutiny and will no longer be able to offer their services to small businesses at low prices. All of this, in turn, may lead to (a) business closures in situations where a business is already in debt or has very narrow margins; (b) layoffs in order to make ends meet; (c) where feasible, SMBs like investment firms leaving the state, even if just over the border (e.g., New York to Connecticut, which among other things would effectively transfer state tax revenues from AOD jurisdictions to non-AOD ones; (d) dampened new firm innovation and investment in these jurisdictions.

### 3. AOD Laws Would Increase the General Uncertainty of State Business Environments

**Cause:** AOD regulations will increase the uncertainty and risk associated with operating a business in a particular state. The broad language in the proposed legislation does not provide SMB owners with clear guidance about what common practices will be covered by the regulations. After all, a basic principle of the rule of law is that legal statutes must be able to guide behavior. In fact, some common and legal business practices that are pro-consumer could be considered “abusive” under AOD legislation as written. And because the state attorney general governs enforcement (e.g., NY), state antitrust law in AOD jurisdictions will be tied to the political winds as different administrations come and go. Finally, while larger businesses will have more resources to deal with such uncertainties, a good deal of the burden will unintentionally be borne by SMBs.

**Examples:** Successful SMBs, whether based in the state or not, may reduce how much they sell to customers in AOD jurisdictions so as not to exceed potential dominance thresholds. Potential SMB owners may forgo registering a business in an AOD jurisdiction or entering such a market with their advertising, online storefronts, physical stores, etc., incurring “opportunity costs.” And common business practices such as volume discounting, rebates, bundling, and exclusive licensing could put SMBs at risk of prosecution due to these activities “harming” competitors - even while providing value to consumers.

**Systematic Effects:** Over the longer term, the less business-friendly environments in AOD jurisdictions clearly could affect where SMBs headquarter their operations and whether and how much they sell within them, which can hurt SMB growth and indirectly hurt consumers in those states. These environments are also likely to reduce investment in businesses located there, whether from private equity, venture capital, or other sources, which more broadly would negatively affect the finance industry, including M&A dealmakers. More broadly, these conditions will have a range of economic consequences, including hindering the ability to raise capital, and attract and hire talent and reducing entrepreneurship, job creation, and economic growth. Ultimately, the effect would be to harm AOD state economies in the global marketplace.

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When discussing antitrust legislation, the fundamental policy challenge remains to foster innovation, growth, competition, and open markets in the long run. That said, while not uniformly negative, there is a gap between the lofty goals of the proposed state legislation and the likely outcomes were it to pass. The legislation is a “mixed bag” with many potential problems as it is currently written, and its success and impact would largely depend on how the legislation is implemented and executed in practice, which may also differ significantly from jurisdiction to

jurisdiction. While the legislation is rooted in good intentions, in its current form, it hurts businesses of all sizes and their customers and disrupts the national system of antitrust law regulated by the Department of Justice and Federal Trade Commission, overseen by Congress.

**The Data Catalyst Institute strongly recommends that state legislators reconsider so-called “abuse of dominance” antitrust legislation and, at a minimum, carefully contemplate and address the economic side effects, particularly on small businesses, before moving forward.**

## About DCI

The [Data Catalyst Institute](#) (DCI) supports policymakers and other stakeholders as they undertake the important and difficult work of enacting sound public policy governing the use of technology and data. DCI reports on regulatory and legislative proposals to celebrate good policy and identify relevant challenges.

Proposals often evolve — before and even after enactment. DCI will monitor amendments, court cases, and other changes to adjust our analyses and conclusions to reflect future changes. Our objective is not to criticize or condemn but rather to support a better, broader understanding among all stakeholders.