

March 15, 2022

Opposition to HF 4144 for Hurting Competition and Minnesota's Consumers

Rep. Stephenson, Chair
Commerce Committee
Minnesota House of Representatives

Dear Chair Stephenson & Members of the Commerce Committee:

Thank you for the opportunity to submit testimony. We ask that you vote **against** HF 4144 because it:

- Punishes successful businesses;
- Hurts Minnesotans; and
- Threatens innovation.

In the United States, antitrust laws are meant “for the protection of competition, not competitors.”¹ In other words, antitrust laws are a “*consumer welfare* prescription,” designed to protect the benefits consumers receive from competition—lower prices, greater output, higher quality, increased efficiency, and innovation.²

But HF 4144 imports Europe's abuse-of-dominance approach, flipping the cardinal principle of American antitrust on its head: it protects competitors at the expense of competition and consumers. For this reason, it should not become law in Minnesota.

1. HF 4144 Hurts Businesses of All Sizes, Especially Successful Ones

In a radical departure from U.S. antitrust law, HF 4144 imports Europe's abuse-of-dominance approach to antitrust enforcement. Under this approach, competitors may sue their rivals for creating better products, innovating too quickly, or even cutting prices.³ This foreign, far-reaching antitrust regime would make Minnesota an unattractive place to do

¹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original; internal quotation marks omitted).

² *Reiter v. Sonotone Corp.*, 422 U.S. 330, 343 (1979) (emphasis in original).

³ For an in-depth explanation, we recommend Alden Abbott's piece highlighting the flaws of a similar abuse-of-dominance bill that has stalled in New York. His argument briefly stated:

“U.S. antitrust law is designed to protect competition, not individual competitors. That simple observation lies at the heart of the Consumer Welfare Standard that for years has been the cornerstone of American antitrust policy. *An alternative enforcement policy focused on protecting individual firms would discourage highly efficient and innovative conduct by a successful entity, because such conduct, after all, would threaten to weaken or displace less efficient rivals. The result would be markets characterized by lower overall levels of business efficiency and slower innovation, yielding less consumer surplus and, thus, reduced consumer welfare, as compared to the current U.S. antitrust system.*”

See Alden Abbott, *NY “Abuse of Dominance” Bill Attacks Consumer Welfare & the U.S. Antitrust Tradition*, Truth on the Market (June 13, 2021) (emphasis added),

<https://truthonthemarket.com/2021/06/13/ny-abuse-of-dominance-bill-attacks-consumer-welfare-and-the-us-antitrust-tradition/>.

business—a cost the state can ill afford, especially when it’s already ranked as having the 46th worst business costs in the nation⁴.

First, this bill will discourage businesses from competing in Minnesota’s markets, or from expanding existing operations within the state. Businesses of all sizes want regulatory environments that have clear, administrable, and predictable rules. When the rules of the road are clear, businesses can plan accordingly. But when those rules are arbitrary in substance, arbitrary in enforcement, and so costly that a business is “damned if it does, damned if it doesn’t,” economic growth will suffer.

HF 4144 enshrines arbitrary rules. Section 1 simply declares that sellers with 40% market share and buyers with 30% market share are “presumed to have a dominant position.”⁵ There is no economic basis for enshrining these thresholds, and the bill doesn’t explain why they are sensible (indeed, one might wonder why the threshold for buyers is lower than the threshold for sellers).

Even worse, the thresholds are so low—and so outside the mainstream in the United States (the Supreme Court has never found monopoly power below 75% market share⁶)—that they will capture small- and medium-sized businesses, as well as Minnesota’s largest corporations including Target, Best Buy, 3M, UnitedHealth Group, Land O’Lakes, and General Mills.

HF 4144 targets big, medium, and small enterprises alike. For businesses looking to enter new markets, Minnesota will surely rank bottom of the list.

Second, the bill will likewise discourage businesses already competing in Minnesota from expanding or offering new products when the liability risks are unclear. Because the bill is so broadly written, and transforms common business practices like use of noncompete clauses or no-poach agreements into antitrust violations, businesses will think twice before expanding operations in Minnesota. For example, the bill would prohibit businesses like Target from expanding into new markets if doing so would hurt competitors (consider Target’s entry into the pharmacy market—this bill would have prohibited that expansion). It would also prohibit Best Buy from offering favorable promotions or discounts on Best Buy-only products. And it would even punish the Mayo Clinic for “imposing contracts by which any person is restrained from engaging in lawful profession, trade, or business of any kind”—in other words, for using a noncompete clause.

With so much legal uncertainty and thus so many liability risks at stake, HF 4144 will hurt businesses of all sizes, forcing them to divert valuable resources to their legal departments and outside law firms. And that’s assuming they can even afford to do that—many cannot, especially as the pandemic continues to inflict economic pain.

Even in good economic times, however, the bill will punish successful businesses—ensuring those with innovative products pay a price for competing on the merits and winning.

⁴ See CNBC, *Top States for Business: Minnesota* (July 15, 2021), <https://www.cnbc.com/2021/07/13/top-states-for-business-minnesota.html> (assigning Minnesota a “D” grade, and ranking the state 42nd in the country, for “cost of doing business” in 2021); Forbes, *Best States for Business 2019: Minnesota*, <https://www.forbes.com/places/mn/?sh=5a41b2ac7b7a> (last visited Mar. 14, 2022).

⁵ H.F. No. 4144, Section 2, Subdivision 2, Subsection c.

⁶ *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 174 (4th Cir. 2014).

2. HF 4144 Hurts Minnesotans

In Europe, where the abuse-of-dominance standard originates, antitrust laws are often used to protect incumbent firms from aggressive competition. Europeans view antitrust as a marketplace-fairness tool: When a business competes too ruthlessly or efficiently, its competitors should be allowed to sue to block or mitigate that behavior.

By contrast, American antitrust laws have always been *focused on consumers*: Rather than protect incumbents from competition, we protect the competitive process and the benefits it produces for consumers. Because HF 4144 adopts Europe's approach, Minnesotans will take a back seat to corporate interests.

The following hypothetical clinches the contrast. Imagine Target's expansion into e-commerce follows a trajectory similar to Amazon's, and it begins rapidly opening warehouses, fulfillment centers, and other supply chain operations. While this expansion would undoubtedly increase Target's already significant competitive pressure on Amazon and Walmart, HF 4144 would prohibit it. Why? Because undoubtedly such an expansion will turn up the competitive pressure on—to name just a few—(1) brick-and-mortar retail stores; (2) e-commerce stores and marketplaces; (3) delivery businesses; and (4) shipping businesses. In fact, if HF 4144 were the law, *Walmart could sue businesses like Target for this expansion!*

Because so many rivals could sue businesses like Target, these Minnesota businesses would likely not expand in the state. And even if it did, the courts could still find that Target abused its dominant position, even if Minnesotans benefitted from lower prices, higher quality products, new innovations, and so on.

When antitrust laws focus on groups other than consumers, they are bound to be used in ways that hurt consumers. We've seen this repeatedly in Europe, and can expect the same in Minnesota should HF 4144 become law.

3. HF 4144 Threatens Innovation

Because HF 4144 protects competitors and not consumers, it will chill innovation. Under existing law, businesses are encouraged to innovate—to develop new products, business models, and user experiences. Our free-market system rewards businesses that innovate in ways that benefit consumers. For that reason, our laws promote innovation even when it comes at a competitor's expense. We privilege the consumer over the competitor.

But the abuse-of-dominance standard privileges the competitor. When a rival innovates in a way that hurts his or her competitors—by, say, inventing new technology that cuts costs so significantly the competitors can't compete on price—the competitors can sue and likely win. HF 4144 would weaponize innovation, transforming it into a cudgel for inefficient or less innovative firms to use against their rivals.

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For these reasons, NetChoice respectfully asks that you vote **against** HF 4144. Thank you for considering our testimony.

Respectfully submitted,

Chris Marchese

Counsel

NetChoice

NetChoice is a trade association working to make the internet safe for free enterprise and free expression.