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TO: Members, New York State Legislature

FROM: Ken Pokalsky, Vice President

SUBJECT: Draft 2021 Legislative & Regulatory Priorities

DATE: January 17, 2021

The following presents our legislative and regulatory priorities as we begin the 2021 state legislative session. It is an abbreviated list, compared to the more expansive legislative agendas we have published in prior years, with a focus on measures that should be adopted – or avoided – as we focus on promoting the statewide recovery of businesses and jobs from the COVID-induced recession. No doubt additional opportunities and challenges will present themselves as 2021 unfolds, and our advocacy efforts will extend beyond the issues discussed today. We look forward to working with the Administration, Senate and Assembly on these and other issues of importance to the state’s residents, workers and businesses.

Business Relief Without State Budget Impact

Businesses continue to support a state COVID response that is driven by public health factors and informed by data. With new state data showing the relatively low incidence of COVID exposure in industries subject to NYForward operating plans and protocols, the state should avoid unwarranted broad-based economic “shutdowns” that are not supported by data, in favor of targeted restrictions based on local clusters or evidence of sector-specific transmissions.

- **Suspend application of experience rating to employer-specific unemployment insurance taxes for 2021.** This would provide significant financial relief from employers whose activities were curtailed by COVID, either through state directive or due to the economic turndown. Executive Order 202.45 gave the state Labor Department authority to suspend application of experience ratings charges effective March 9, 2020 so that employer-specific UI tax rates for 2021 would not be impacted by COVID-related layoffs. The Labor Commissioner has yet to effectuate that change. We recognize that this pushes financial recovery of the state’s UI account further into the future, and we further recommend that the Administration appoint an advisory committee to address on longer-term UI system funding issues. *2020 Legislation – None pending.*
- **Adopt limited COVID-related liability relief for all employers.** We have supported legislation at both the state and federal level that would provide qualified liability protection for any business that operates in compliance with state law and attempts, in good faith, to adhere to any law, executive order and/or guidance issued by a state agency pursuant to an executive absent a showing of “gross negligence” by the business, effective as of March 7, 2020 and effective through the end of the COVID-19 emergency declaration. *2020 Legislation – Drafted but not introduced.*
- **Modify the NY Forward loan program to allow applications by businesses that have received federal Payroll Protection Program loans and consider adopting a “loan forgiveness” component targeting small businesses in sectors most significant harmed by COVID closures and loss of sales.**
- **Assure full and effective implementation of new, employer-oriented workforce development funding programs as authorized in the FY 2019 state budget.** The COVID pandemic has caused

considerable economic disruption, while also highlighting significant needs and opportunity going forward. There is an essential public policy need to assure that state workforce development funding be responsive to current skill needs of the private sector and promote opportunities for New Yorkers to obtain good paying jobs in growing and emerging industries. *2020 Legislation – None.*

- **Adopt a comparative negligence standard to be used for actions brought under Labor Law Section 240/241 so that entities that provide safety training and equipment, including OSHA safety courses, have the right to demonstrate in court that a worker contributed to an injury.** This applies the CPLR's contributory negligence standard applicable to other categories of tort claims. *2020 Legislation – None pending. Last introduced as S.326 (Akshar) / A.3737 (McDonald) in 2018.*
- **Adopt a revenue neutral, opt-in unincorporated business tax, with an offsetting personal income tax credit for owners of unincorporated businesses, as a means to assure the full federal deductibility of state taxes paid by these “pass thru entities.”** This approach has already been adopted by eight states, and the IRS has issued guidance confirming that such pass-through entity tax regimes will create deductible state tax expenses for their individual owners. The legislation would be revenue neutral to the state but would result in lower federal tax liability for participating pass thru businesses. *2020 Legislation – None pending. The Tax Department drafted a mandatory, rather than “opt-in” bill in 2018, which was not formally introduced.*
- **Authorize the use of biogas, hydrogen and other emerging technologies to ensure that CLCPA carbon reduction mandates are met while addressing cost and affordability, reliability, emission reductions, and system resilience.** The CLCPA's definition of “renewable energy systems” does not include biomass or biogas, thereby excluding carbon negative fuels such as renewable natural gas (RNG). Achieving the targets established by the CLCPA will require the development and utilization of a wide array of low emission energy sources and should include RNG and green hydrogen. Statutory and regulatory clarity will send clear market signals to existing businesses as well as attract companies and private investment to New York State. *2020 Legislation – Drafted but not introduced.*
- **Extend the duration of the New York Shared Work Program.** Employers use this program to avoid layoffs and the resultant negative impact on workers. The voluntary shared work program, in conjunction with PPP and EDIL loans, have helped maintain stable work forces by supporting payroll and benefits. Unfortunately, the Shared Work Program in New York only allows for 26 weeks of benefits in a 52 week period. Considering the ongoing pandemic, the legislature should extend the program period for up to 52 weeks – an approach already taken in several neighboring states. *2020 Legislation – New issue.*

Raising Revenues without Taxation

- **Allow entities to own multiple licenses for the sale of wine and spirits for off-site consumption.** This would increase consumer choice and convenience, as well as increase the number of outlets for NYS produced wine and spirits. It would also increase revenues through additional license sales, increases tax receipts on wine and spirits sales, and a general increase in economic activity by supporting the state's wine and spirits industry. *2020 Legislation – None pending.*
- While we have not supported legalization of recreational use cannabis, we recognize its wide support in New York State, and its legalization in neighboring states. **However, we strongly urge that any legalization bill fully preserves the ability of employers to assure a safe, impairment-free workplace for the benefit of employees, customers and the general public.** This approach would treat cannabis use in the workplace in the same manner as other legal consumables like alcohol. Employers should have the ability to develop and communicate policies that prohibit any presence of active tetrahydrocannabinols as determined by testing, and the right to test both pre-employment and during the course of employment - either randomly or for cause. Employees who test positive for the active ingredients of cannabis in violation of the employer's policy may be subject to adverse employment actions consistent with the provisions of

that policy. *2020 Legislation – S.7509 (Budget) / A.9509 (Budget), Part BB.*

- **Amend the Racing, Pari-mutuel Wagering and Breeding law to allow the four upstate casino gaming resorts to conduct sports betting, and clarify that mobile sports wagers are made and take place upon acceptance at the location of the server, regardless of the physical location of the individual placing a wager.** As part of the 2013 Upstate New York Gaming Economic Development Act, the four upstate casino gaming resorts were granted the ability to conduct sports betting in the event of a change in federal law prohibiting sports betting outside of certain states. On May 14, 2018, the United States Supreme Court ruled the Professional and Amateur Sports Protection act unconstitutional in *Murphy v. National Collegiate Athletic Association* which resulted in the federal prohibition being overturned. *2020 Legislation – S.17-D (Addabbo) / A.6113-C (Pretlow).*

Business “Regulatory Relief”

- **Allow public accounting firms to incorporate in New York State with minority ownership by individuals who are not Certified Public Accountants.** Similar legislation has passed the Senate unanimously in each of the past five sessions. *2020 Legislation – S.3842-B (Stavisky) / A.2919-A (Peoples-Stokes) and S.7506 (Budget) / A.9506 (Budget), Part G.*
- **The state should allow for electronic notarization in New York, easing some burden from transactions for both businesses and individuals alike.** An early Executive Order allowed the use of electronic video conference technology in notarization. However, the state should go further. At least twenty-five states have passed laws to allow for electronic notarization, and New York State should as well. *2020 Legislation – S.4352-B (Skoufis) / A.4076-B (Rozic).*
- **Amend the General Business Law to allow virtual only shareholder meetings and other e-commerce-based business activities until the later of December 12, 2021 or the end of the current state of emergency.** This relief has been granted through Executive Order, but the relatively short duration of specific executive orders has caused significant uncertainty as to the continued availability of this relief. This legislation would provide that certainty through the end of calendar 2021. *2020 Legislation – S.9110 (Benjamin) / A.11150 (Paulin).*
- **Amend the General Business Law §399-z.5.a to allow for continuation of telemarketing calls during a state of emergency if communications systems are not impacted. Recent legislation banned marketing calls during a state of emergency, based on the experience of natural disasters’ impact on telecommunication networks. The COVID-based state of emergency had no such impact, but still many employers, and employees, have been precluded from engaging in marketing efforts due to the lack of flexibility in law.** *2020 Legislation – None pending.*
- **The LIBOR (London InterBank Offered Rate) interest rate index is used in approximately \$200 trillion of financial products worldwide, however LIBOR’s regulator has announced that it is to be discontinued after the end of 2021.** It is essential that New York State address this potential disruption to financial markets by adopting legislation that (1) prohibits a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of the discontinuance of LIBOR; (2) definitively establishes that the ARRC-endorsed rate is an appropriate replacement for LIBOR in contracts; and (3) provides a safe harbor from litigation for the use of the ARRC-endorsed rate. In addition, legislation should require the use of the ARRC-endorsed rate where the contract language is silent or the fallback provisions prescribe the use of the now-disfavored LIBOR. This approach is based, in part, on New York legislation enacted in 1998 in anticipation of the discontinuance of sovereign currencies that were being replaced by the Euro. *2020 Legislation – S.9070 (Thomas) / A. 11098 (Zebrowski), subject to amendments.*
- **Explore options to provide benefits to "Gig" Workers.** Last year, the state Senate held hearings regarding the status of “gig” workers and other categories of independent contractors, at which we testified in favor of a hybrid “third option,” under which intermediaries contribute to the funding of a range of new

benefits for contractors. Last year, California voters approved a referendum – Proposition 22 – which ensures rideshare drivers and delivery workers remain independent in California, while also establishing a minimum earning floor, and additional protections for workers. We expect that the issue of worker classification will remain an active issue in New York during this legislative session, and we will continue to work with our affected members to fashion workable standards for gig workers and other categories of contract employees. *2020 Legislation – S.6538 (Savino).*

- **Amend the Labor Law to require anti-harassment training every other year for employees.** Legislation adopted in 2018 requires that all employees in the state receive anti-harassment training upon their hiring, and on an annual basis. This annual training mandate imposes excessive burdens on business resources. The retraining mandate should be amended to require biennial training. *2020 Legislation – None pending.*
- **Adopt legislation to establish a self-directed or “banking” approach for large electric customers encompassing all applicable state-imposed Clean Energy charges.** The self-directed or banking approach would maximize investments in renewable energy, load reduction and REV related projects while at the same time moderating rate impacts and reducing competitive inequities associated with current energy assessments. By allowing customers to only recoup money paid into Energy Saving Accounts upon completion of energy efficiency projects at their own facilities, customers will be strongly motivated to commit to clean energy and efficiency projects, and would provide large non-residential customers with the flexibility to implement energy efficiency projects – as well as system efficiency, renewable projects and infrastructure projects – that may be specific to their industries, facilities and/or processes. *2020 Legislation - S.3410 (Harckham) / A.2282 (Woerner).*
- **Modernize the record keeping requirements mandated by Insurance Law §325 by authorizing domestic insurers to “make available by electronic means” various records, including its charter, by-laws, and books of account.** Currently, the Department of Financial Services requires domestic insurers to maintain printed documents at their principal office. This amendment would allow insurers to be more efficient and in line with the current state of technology. *2020 Legislation – New issue.*
- **Modernization of reporting, filing, and signature requirements by eliminating or amending several duplicative, burdensome, and outdated provision of the Insurance Law,** including: the mandate that insurers adopt a formal enterprise risk management (ERM) function and file an annual enterprise risk report; eliminate the mandate to retain a hard copy of every advertisement done by a life company; and to allow the electric distribution of approved policy forms or authorized replacement forms. *2020 Legislation – New issue.*
- **Amend New York State’s new paid sick leave law to excuse employers of 50 or fewer employees; allow employers the option to buy out accrued but unused paid sick leave (as opposed to/ in addition to rolling over unused time); and clarify that collective bargaining agreements may negotiate benefits different from Labor Law §196-b.** *2020 Legislation – New issue.*

Reject Damaging Legislative Proposals

Actions taken during 2020, including some spending reductions, increased borrowing, and federal assistance, along with a general economic recovery producing additional tax revenues, may allow the state to complete FY 2021 without any significant new revenue measures. The need for additional taxes for FY 2022 will be impacted by possible additional federal assistance to be pushed by the Biden administration. While New York businesses continue to deal with the pandemic and recession, we encourage the state to avoid imposing additional costs, restrictions and mandates on employers. Instead, we urge lawmakers to focus on helping businesses stay open and promote the retention and creation of good paying jobs that will position the state for a strong post-COVID economic recovery. It should look at opportunities to generate revenues by promoting new and expanded economic activity. To the extent that new or increased taxes are considered, the state should avoid tax measures

that place New York at a significant competitiveness disadvantage, avoid measures that target key economic sectors, and consider temporary measures that would phase-out as the economy recovers to pre-COVID levels.

- **We strongly oppose amendments to the Workers' Compensation Law to create an occupational disease presumption for people who have contracted COVID-19.** This proposal completely ignores both common law and statutory concepts of causation of injury and would shift billions of dollars of costs onto the state's workers' compensation system and employers by which it is financed. It would also complicate the treatment of COVID patients and put greater strain on already very stretched health care resources and could interfere with available federal funding and other funding likely to come in future federal stimulus packages. *2020 Legislation – S.8266 (Ramos) / A.10401 (Simotas).*
- **We oppose legislation that would make significant amendments to the state's General Business Law's provisions regarding illegal monopolies.** These proposals would apply significantly increased criminal penalties to violations and would apply antitrust provisions to the "abuse" of a "dominant position" in the conduct of any business or commerce. These key terms are undefined in the legislation but are intended to significantly lower the threshold for defining violations. This legislation would also authorize private class action suits for the recovery of damages and would provide expansive authority for both the Attorney General and private plaintiffs to bring cases in response to market activities they disfavor, without having to demonstrate harm to consumers. *2020 Legislation – S8700-A (Gianaris) / A.10870 (Dinowitz).*
- **We oppose legislation that would create a separate mechanism in the False Claims Act to allow for the recovery of "damages, including consequential damages" in virtually any tax issue in dispute, without having to prove that such avoidance was done "knowingly."** This bill would open all categories of tax disputes and filing errors to Attorney General and third-party litigation. As a practical matter, this means that issues ranging from simple math errors, to a misunderstanding of a provision of tax law, to disputes based on a lack of clarity in statute, regulation and/or guidance could be the subject of third-party litigation. Moreover, these third-party suits could be commenced for up to ten years after the date of the alleged violation, well past the period in which the Tax Department is statutorily required to assess tax underpayments, typically set at three years after a tax was due or a return was filed. *2020 Legislation - S.8872 (Hoylman) / A.11066 (Weinstein).*
- **We oppose legislation that would mandate that business interruption insurance policies, whose provisions – and premiums – do not cover pandemics, to provide coverage for losses that occurred as a result of the COVID-19 pandemic.** While well meaning, these bills have both immediate and long-term negative implications for businesses of all kinds throughout the state. While constitutionally suspect, such ex post facto legislation would simply shift the economic damage of COVID from one sector of businesses to another. Such an action would be inconsistent with recovery efforts and the variety of relief packages being implemented by the federal government. *2020 Legislation – S.8211-A (Gounardes) / A.10226-B (Carroll).*
- **We oppose legislation that would amend the Estates, Powers and Trusts Law in relation to payment and distribution of damages in wrongful death actions.** This and others proposals would expand legal remedies for a variety of cases, including recovery for a decedent's pain and suffering. This legislation goes far beyond the current law that limits recovery to economic monetary damages. There is simply no question that this bill would result in severely increased costs on all New York civil defendants, public and private alike, who would see costs needlessly increase. *2020 Legislation - S.4006 (Hoylman) / A.5612 (Weinstein).*
- **We continue to oppose the establishment of a government-run healthcare system in New York, which would have a deleterious effect on the state's economy.** The proposed New York Health Act is a costly and damaging approach to a problem for which there are many other reasonable alternatives. Starting at just under \$100 billion per year, with estimates as high as \$250 billion annually, the cost of this legislation could be more than the entire current state budget, necessitating tax increases larger than any in history. Some studies point to a potential loss of 150,000 jobs in the state. The majority of nations that offer universal coverage do so with a mix of private and public insurance; the exact same as our current

system. In contrast, this proposed legislation is far more extreme, outlawing private insurance all together. Improving our current system and reaching total coverage is a widely accepted goal. Burdening our state economy with massive tax increases and job losses is an unworkable approach. *2020 Legislation – S.4840-A (Rivera) / A.4738-A (Gottfried).*

- **The Business Council opposes the “New York Privacy Act” in its current form for a number of reasons.** This proposal covers all legal entities that do business in, or that sell products and services in, New York State. The bill has no small business thresholds and would have a disproportionate impact on smaller entities. The bill covers very broad categories of personal data. It contains an expansive definition of “privacy risk” to include such things as “inconvenience”, “unwanted communications”, “alters that individual’s experiences” or “limits that individual’s choices”. The opt-in requirements may lead to very confusing operations internally. One key issue is the creation of a data fiduciary concept with expressed duties of care and confidentiality to protect individuals from “privacy risk” with legal responsibilities as data fiduciaries superseding legal responsibilities owed to owners and shareholders of the company. In response, we have worked with our IT members to draft a counter proposal that addresses both consumer privacy concerns and business operational concerns. *2020 Legislation - S.5642 (Thomas) / A.8526 (Rosenthal).*
- **The Business Council opposes legislation that would impose a lien on the assets of business owners and managers in response to accusations of wage and hours violations. Imposing a lien on the assets of these individuals merely on the accusation of violations would have a chilling effect on business lending, insurance and investment in New York.** *2020 Legislation – S.2844-B (Ramos) / A.486-B (Rosenthal).*
- **We oppose the EMPIRE Act, which would allow the delegation of state Labor Law enforcement authority to private actors and would authorize an aggrieved employee, whistleblower or representative organization to initiate a public enforcement action on behalf of the commissioner for certain provisions of the labor law.** Abdicating Department of Labor obligations to third parties with motives that may or may not be consistent with the best interest of the employee would certainly add to the already onerous regulatory environment in New York State. *2020 Legislation S.1848-A (Hoylman) / A.2265-A (Joyner).*
- **We oppose legislation that would vastly expand the authority vested in the Department of Public Service (DPS) to penalize utilities for non-compliance with established regulations.** Public Service Law Section 25-a already grants the Public Service Commission (PSC) broad authority to assess civil penalties against combination gas and electric corporations and their respective executive officers. Removing the requirement that a ‘order to show cause’ be publicly issued to begin a formal investigation would make the process far less transparent, and repealing language that allows for ‘reasonable’ compliance would create unnecessary friction in what should be a results-oriented process. Significantly, vesting the PSC with the authority to revoke operating certificates for administrative determinations of non-compliance could set a dangerous precedent for any entity that requires such a certificate to do business in New York State. We would encourage the legislature not to cede such broad and important authority to an administrative agency not accountable to the electorate. *2020 Legislation – A.11120 (Paulin).*