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FOR DISCUSSION ONLY

Antitrust Pre-Merger Notification Act

Uniform Law Commission

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Antitrust Pre-Merger Notification Act

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Prefatory Note

Since 1976, the federal Hart-Scott-Rodino Act ("HSR"), 15 U.S.C. Section 18a, has required companies proposing to engage in most significant mergers or acquisitions to file a notice with the two federal antitrust agencies—the Federal Trade Commission and the Justice Department's Antitrust Division—at least 30 days (or, in the case of acquisitions out of bankruptcy or cash tender offers, 15 days) prior to closing. The HSR filing includes both a basic form detailing information like the corporate structure of the parties, and additional documentary material, such as presentations about the merger to the company's board of directors.

The HSR filing allows the federal antitrust agencies to scrutinize mergers before they are consummated. Prior to HSR, the agencies often learned of a merger after it had already closed, and then spent months or years investigating the transaction. If the agencies ultimately decided to challenge the merger's legality through a lawsuit, the only possible remedy was to unscramble a deal often years after it had closed, and the businesses had become integrated. This was not an optimal situation for the agencies, the businesses, or the public. HSR shifted most merger review to the pre-merger phase, allowing earlier and more efficient engagement between the agencies and the merger parties.

State Attorneys General ("AGs") also have a legal right to challenge anticompetitive mergers, both under the federal Clayton Act and their own state antitrust laws. States often play an important role in merger investigations and challenges, either in parallel with the federal agencies, or on their own. However, the AGs do not have access to the HSR filings. Further, HSR's strict confidentiality provisions prohibit the federal agencies from sharing HSR filings with the AGs. Most AGs have the right to subpoena HSR filings under their state laws, but that requires that they first become aware that an HSR filing of interest has been made, and then go through a cumbersome and time-consuming process to issue a subpoena and wait for compliance. The upshot is that, by the time most AGs obtain access to HSR filings, the federal agencies and parties are often far along in the process of investigation and negotiation. This puts the AGs at a significant disadvantage in the process of merger review. It also creates additional costs and uncertainties for the merging parties.

In response to these shortcomings, some states are considering legislation that would create a state-specific pre-merger notification requirement. However, some of these proposals would impose obligations additional to the HSR obligations on merging parties and potentially move state antitrust review out of sync with federal antitrust review. For example, a proposed bill in New York would have imposed a 60-day waiting period to close the deal, in contrast to HSR's 30-day waiting period. It also would have dramatically lowered the filing threshold by an order of magnitude, which would have significantly increased the burden on both businesses and the AG's office. The business community has reacted with alarm to the prospect of burdensome and idiosyncratic state-specific pre-merger notification provisions.

The Antitrust Pre-Merger Notification Act is intended to address the concerns of both the AG and business communities by creating a simple, non-burdensome mechanism for AGs to

receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality obligations. Under the Act, covered entities—defined as those having their principal place of business or at least a specified threshold of annual revenues in the state—must provide their HSR filing (both the basic form and the additional documentary material) to the AG contemporaneously with their federal filing. The material filed with the AG is subject to essentially the same confidentiality protections as applicable to the federal agencies, except that an AG that receives HSR materials may share them with any other AG whose state has also adopted this Act. The anticipated effect is to facilitate early information sharing and coordination among state AGs and the federal agencies, subject to confidentiality obligations and without imposing any significant burden on either the merging parties or the AGs. It is also anticipated that the AGs may facilitate information exchange and coordination by establishing a secure central database or repository for HSR filings accessible to AGs whose states have adopted this Act.

As of the time of this writing, there is a robust national debate concerning the past and future of antitrust policy, including whether there should be a significant invigoration of anti-merger enforcement. This proposal takes no side in that debate. By providing AGs earlier, confidential access to HSR filings, it is not intended to suggest any view on the merits of the mergers they may review or how they should wield their investigatory and litigation powers. Nor is the goal of minimizing the burden on business meant to suggest any view on the optimal level of merger activity or regulatory review of mergers. Rather, this act is animated by a spirit of good government—of respecting the role of the States in the merger review process, of the need for confidentiality, and of advancing the efficiency of the process for the benefit of all parties involved.

Antitrust Pre-Merger Notification Act

Section 1. Title

This [act] may be cited as the Antitrust Pre-Merger Notification Act.

Section 2. Definitions

In this [act]:

(1) "Additional documentary material" means the additional documentary material required to be filed with a Hart-Scott-Rodino form.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Filing threshold" means the minimum size of a transaction that:

(A) requires the transaction to be reported under the Hart-Scott-Rodino Act, 15 U.S.C. Section 18a[, as amended]; and

(B) is in effect when a merging party makes a pre-merger notification.

(4) "Hart-Scott-Rodino form" means the form required to be filed with a pre-merger notification.

(5) "Merging party" means a business, nonprofit, or other entity required to file a pre-merger notification.

(6) "Pre-merger notification" means a notification filed with the Federal Trade Commission and the United States Department of Justice Antitrust Division under the Hart-Scott-Rodino Act, 15 U.S.C. Section 18a[, as amended].

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law in paragraph (6). A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase ", as amended". A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Section 3. Filing Requirement

A merging party that files a pre-merger notification shall file contemporaneously a complete electronic copy of the Hart-Scott-Rodino form with the Attorney General if:

(1) the merging party's principal place of business is in this state; or

(2) in the calendar year preceding the filing of the pre-merger notification, the merging party's annual gross revenue in this state was at least twenty (20) percent of the filing threshold.

Comment

The goals of the filing requirement are (a) to ensure that the Hart-Scott-Rodino form and the additional documentary material are filed with one state and (b) to provide notice through the form alone to every state that might have a significant interest in the proposed merger. Paragraph (1) is directed to the first goal; paragraph (2) to the second goal.

The Section uses two well-established criteria to determine when a merging party has a filing obligation in a state. Principal place of business in paragraph (1) is a well-understood concept from federal diversity jurisdiction, and annual gross revenue in a state in the preceding calendar year in paragraph (2) should be easy to ascertain from tax filings. As noted in the definitions, the filing threshold refers to the minimum size of transaction threshold for determining reportability under the Hart-Scott-Rodino Act that the Federal Trade Commission adjusts annually by rule pursuant to Section 7A(a)(2) of the Clayton Act, as amended by the Hart-Scott-Rodino Act. For reference, in 2023 the minimum size of transaction threshold promulgated by the FTC was $111.4 million. Hence, for illustrative purposes, a party that made a Hart-Scott-Rodino pre-merger notification in 2023 and did not have its principal place of business in a state that adopted this Act would need to determine whether its 2022 annual gross revenue in the state was at least 20% of $111.4 million. If so, the party would be obligated to make a filing in the state pursuant to Section 3(2).

Section 4. Additional Documentary Material

(a) A merging party that files a Hart-Scott-Rodino form under Section 3(1) shall include with its filing a complete electronic copy of the additional documentary material.

(b) On request of the Attorney General, a merging party with its principal place of business in another state that has filed a form under Section 3(2) shall provide a complete electronic copy of the additional documentary material to the Attorney General not later than [seven] days after receipt of the request.

Comment

This Section obligates a merging party that has its principal place of business in a state to provide both the HSR form and the additional documentary material to the state's Attorney General contemporaneously with the HSR filing. In other states where the party meets the annual gross revenue threshold, the party need only provide the basic HSR form with their initial filing, although the Attorney General may then request the additional documentary material. The reason for this structure is to prevent Attorneys General from being inundated with voluminous additional documentary material that they have no interest in reviewing. To the extent an Attorney General does not receive the additional documentary material with the initial filing but is interested in reviewing that material sooner than the seven days allowed for a party to submit that material upon request, the Attorney General may request that material from the Attorney General of the party's state of principal place of business under Section 7 (assuming that that state has also passed this Act).

Section 5. Fee Prohibition

The Attorney General may not charge a fee under Section 3 or 4.

Section 6. Confidentiality

(a) Except as provided in subsection (c) and Section 7, the Attorney General may not make public or disclose:

(1) a Hart-Scott-Rodino form filed under Section 3;

(2) the additional documentary material filed or provided under Section 4;

(3) information that the form or the additional documentary material were filed with or provided to the Attorney General; and

(4) the merger proposed in the form.

(b) The information in subsection (a) is exempt from disclosure under [cite to state's freedom of information act.]

(c) The information in subsection (a) may be disclosed in an administrative proceeding or judicial action when the proposed merger is relevant to the proceeding or action.

(d) This [act] does not reduce any other confidentiality or information security obligation of the Attorney General imposed by federal law or other law of this state.

Legislative Note: *A state should examine its freedom of information act to ensure that no conflict exists with the exception to disclosure in subsection (a) and may need to amend its freedom of information act to align it with the exception in subsection (a).*

Comment

Confidentiality is highly important for this Act and the entire HSR filing process. The HSR materials contain confidential and valuable information. Improper disclosure could jeopardize the transaction and harm competition, but in addition it could pose securities law problems and allow unfair competition, or even facilitate collusion. These protections mirror protections that are imposed on the federal agencies which also receive the information.

This Section ensures that Attorneys General use the HSR materials only for legitimate investigatory and law enforcement purposes, and do not disclose any HSR material except for those permissible purposes. The fact that an HSR filing has been made is included in the covered confidentiality obligations. In other words, an Attorney General may not disclose even the fact that two parties are proposing to merge (other than in an administrative proceeding or judicial action) if that information has become known only through compliance with this Act.

Section 7. Reciprocity

(a) The Attorney General may disclose a Hart-Scott-Rodino form filed under Section 3 and additional documentary material filed under Section 4 to the attorney general of any other state that enacts the Pre-Merger Notification Act with the confidentiality provisions of the Act.

(b) A Hart-Scott-Rodino form and additional documentary material received by the attorney general of another state that is disclosed to the Attorney General of this state under a substantially similar law is subject to the same confidentiality protections as if filed with the Attorney General of this state under Section 3 or 4.

(c) If the Attorney General discloses under subsection (a) a Hart-Scott-Rodino form or additional documentary material to the attorney general of another state, the Attorney General of

this state, not later than [seven] days after the disclosure, shall give notice of the disclosure to the merging party that filed the pre-merger notification.

Comment

This Section does not require the Hart-Scott-Rodino form or additional documentary material to be delivered individually to each attorney general. An attorney general, or the attorneys general collectively, may establish a secure central electronic database of the materials that can be shared only with attorneys general entitled to receive the materials. The establishment of a secure central database would not conflict with the confidentiality provisions of this act.

Section 8. Civil Penalty

A merging party that fails to comply with Section 3 or 4 is subject to a civil penalty of not more than $[10,000] per day of non-compliance. The Attorney General may seek the imposition of such a penalty in any court of competent jurisdiction.

Comment

The sanctions provision is intended to incentivize compliance with the statute. A $10,000 per day fine is intended to serve as a limit rather than an automatic penalty. In determining whether any fine should be levied and its amount, a court should consider factors such as: (1) whether the non-compliance was intentional, negligent, accidental, or excusable; (2) whether the non-compliance materially impaired the Attorney General's ability to engage in merger review; and (3) whether other States have, or are likely to, impose sanctions for violations of their States' laws with respect to the same transaction. The provision for monetary sanctions is not meant to prevent a court of competent jurisdiction from ordering such equitable relief as the court may deem appropriate.

Section 9. Uniformity of Application and Construction

In applying and construing this act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 10. Effective Date and Applicability

This [act] takes effect on [insert date] and applies only to a pre-merger notification made after the effective date of this Act.