FIRST SUPPLEMENT TO MEMORANDUM 2024-24

Antitrust Law: Status Report (Update on the Uniform Law Commission's Antitrust Pre-Merger Notification Draft)

At its December 19, 2023, meeting, the Commission[1] heard a presentation from representatives for the Uniform Law Commission's (ULC) Antitrust Drafting Committee, about a draft of a uniform act on Antitrust Pre-Merger Notification (see Memorandum 2023-49). Since then, the draft has been revised and the new version is attached to this memorandum. Daniel Robbins, who is the Chair of the ULC's Antitrust Drafting Committee, will provide an update on the draft to the Commission at its June 20, 2024, meeting. His PowerPoint presentation relating to the draft is also attached.

Respectfully submitted,

Sharon Reilly
Executive Director

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

D R A F T

FOR DISCUSSION ONLY

Antitrust Pre-Merger Notification Act

Uniform Law Commission

June 3, 2024 Informal Session

This draft, including the proposed statutory language and any comments or reporter's notes, has not been reviewed or approved by the Uniform Law Commission or the drafting committee. It does not necessarily reflect the views of the Uniform Law Commission, its commissioners, the drafting committee, or the committee's members or reporter.

May 17, 2024

Antitrust Pre-Merger Notification Act

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

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Steven L. Willborn	Nebraska, *Vice Chair*
Levi J. Benton	Texas
William H. Clark Jr.	Pennsylvania
Parrell D. Grossman	North Dakota
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Other Participants

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Emilio Varanini,	California, *American Bar Association Section Advisor*
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Antitrust Pre-Merger Notification Act

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Antitrust Pre-Merger Notification Act

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 form detailing information, such as the corporate structure of the parties, and additional documentary material, such as presentations about the merger to the company's board of directors. In 2023, the Federal Trade Commission proposed new regulations increasing the amount of material required to be submitted in the form and additional documentary material. As of this writing, the regulations have not been finalized.

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 reviews 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. In some cases, the merging parties voluntarily waive the HSR's confidentiality restrictions to allow AGs to obtain access to filing materials, however that process can take some time to negotiate. As a result, 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 have considered legislation that would create a state-specific pre-merger notification requirement for all transactions in every sector. 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 for all transactions in every sector, which

would have significantly increased the burden on both businesses and the AG's office. A similar bill was introduced in Maryland in 2023. The business community has reacted with alarm to the prospect of burdensome and idiosyncratic state-specific pre-merger notification provisions that apply to all transactions in every sector. Both bills failed to pass. A new antitrust bill including new merger regulations was introduced in New York in May of 2024 and new merger rules have been proposed in California by stakeholders in an antitrust review process being run by the California Law Revision Commission.

The Antitrust Pre-Merger Notification Act is intended to address the concerns of both the AGs 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 persons—defined as persons who have 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, under certain enumerated circumstances, 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 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 the 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 the 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 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 requires the transaction to be reported under the Hart-Scott-Rodino Act and is in effect when a person files a pre-merger notification.

(4) "Hart-Scott-Rodino Act" means Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. Section 18a[, as amended].

(5) "Hart-Scott-Rodino form" means the form filed with a pre-merger notification, excluding additional documentary material.

(6) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(7) "Pre-merger notification" means a notification filed under the Hart-Scott-Rodino Act with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency.

(8) "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 (4). 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) A person filing a pre-merger notification shall file contemporaneously a complete electronic copy of the Hart-Scott-Rodino form with the Attorney General if:

(1) the person has its principal place of business in this state; or

(2) the person or a person it controls directly or indirectly had annual net sales in this state of the goods or services involved in the transaction of at least 20 percent of the filing threshold.

(b) A person that files a form under subsection (a)(1) shall include with the filing a complete electronic copy of the additional documentary material.

(c) On request of the Attorney General, a person that filed a form under subsection (a)(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.

(d) The Attorney General may not charge a fee connected with filing or providing the form or additional documentary material under this section.

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. Subsection (a)(1) is directed to the first goal; subsection (a)(2) to the second goal.

The Section uses a well-established criterion to determine when a person has a filing obligation in a state. Where a company has its principal place of business is a well-understood concept from federal diversity jurisdiction, and annual net sales from income and expense

statements is a widely utilized measure of economic activity borrowed from the HSR regulations. 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 2024 the minimum size of transaction threshold promulgated by the FTC was $119.5 million. Hence, for illustrative purposes, a party that made a Hart-Scott-Rodino pre-merger notification in 2024 and did not have its principal place of business in a state that adopted this act would need to determine whether its 2023 annual net sales in the state were at least 20% of $119.5 million. If so, the party would be obligated to make a filing in the state pursuant to Subsection (a)(2). To the extent that both the acquiring and acquired persons are required to report a transaction under the Hart-Scott-Rodino Act, both persons might be required to file with the same state AG if both persons fell within the coverage of this act.

The reference in subsection (a)(2) to the annual net sales in the state being those of "goods or services involved in the transaction" is intended to limit the filing obligation under subsection (a)(2) to circumstances where the filing party's economic activity in the state is in the same business category as assets involved in the acquisition. Consistent with the requirements of federal law concerning reporting by corporate parents of the activities of entities they control directly or indirectly (see, for example, 16 C.F.R. 801(a)(1)), the obligation under subsection (a)(2) is triggered if the reporting party controls entities that have the requisite sales in the state. For example, if a holding company was the reporting party under HSR, and that company owned a subsidiary that had the requisite amount of sales in the state of the goods or services involved in the transaction, the reporting requirement under subsection (a)(2) would be triggered. However, if the parent company or its subsidiaries had the requisite amount of sales in the state, but those were not in the same goods or services as those involved in the transaction, there would be no reporting requirement under subsection (a)(2).

Subsection (b) obligates a person 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 AG contemporaneously with the HSR filing. In other states where the party meets the annual net sales threshold, the person need only provide the basic HSR form with their initial filing, although the AG may then request the additional documentary material under Subsection (c). The reason for this structure is to prevent AGs from being inundated with voluminous additional documentary material that they have no interest in reviewing. To the extent an AG 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 AG may request that material from the AG of the party's state of principal place of business under Section 6 (assuming that that state has also passed this act).

The spirit of this act is to facilitate more timely and efficient state AG receipt of materials relating to potentially interesting mergers without imposing significant additional burdens on the business community. Accordingly, Subsection (d) prohibits the charging of fees for simply making available to the AG information that the AG already could procure by subpoena, for which it could not charge the company a fee. Although reviewing merger filings requires resources, this act is not designed to impose additional costs on AG offices. To the contrary, by

facilitating quick and efficient receipt of HSR files, the act will save the AG time and resources previously consumed in bargaining with merging parties over HSR waivers or subpoenaing HSR files. Further, the confidentiality provisions of this act are designed to facilitate information sharing and collaboration among the AGs and the federal antitrust agencies, and among the AGs themselves. More efficient inter-agency collaboration should reduce duplication of effort and allow existing resources to be deployed more efficiently in merger review.

Separately from a filing fee, some state statutes permit the AG to recover investigatory costs from investigation subjects in certain contexts. Subsection (d) is not meant to affect the operation of those statutes. To the extent that an AG seeks recovery of investigation costs (as opposed to a filing fee) pursuant to a separate statute, Subsection (d) does not bar such fee recovery.

It is expected that the information being provided pursuant to this act will be used for and retained in connection with an investigation of the transaction. It is further expected that states availing themselves of the act will cooperate with merging parties in working out a mode of filing that parallels any federal process for filing the HSR notice and documents.

Finally, it is expected that if there is an investigation at all in connection with the transaction notified under the act, such an investigation will begin promptly upon receipt of all of the information provided under the act.

Section 4. Confidentiality

(a) Except as provided in subsection (c) or Section 5, 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 3;

(3) a Hart-Scott-Rodino form or additional documentary material provided by the attorney general of another state under a law substantially similar to Section 5(a);

(4) that the form or the additional documentary material were filed or provided under Section 3, or provided by the attorney general of another state under a law substantially similar to Section 5(a); or

(5) the merger proposed in the form.

(b) The Hart-Scott-Rodino form, additional documentary material, and other information

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

(c) Subject to a protective order entered by an agency, court, or judicial officer, the Attorney General may disclose the Hart-Scott-Rodino form, additional documentary material, or other information listed in subsection (a) in an administrative proceeding or judicial action if the proposed merger is relevant to the proceeding or action.

(d) This [act] does not:

(1) limit any other confidentiality or information-security obligation of the Attorney General; or

(2) preclude sharing information with the Federal Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency.

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 AGs 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 AG 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 5 is not meant to prevent AGs from publicly disclosing information that is already in the public domain.

To the extent that confidential material needs to be disclosed in a judicial document such as a complaint, it is customary practice for any confidential material to be redacted in the public version of the document, with the unredacted version filed under seal. It is anticipated that state AGs will continue to follow that practice, even as to complaints filed before a court has had an opportunity to implement a protective order.

Subsection (d)(1) is intended to preserve any other confidentiality or information-security obligations, whatever their source, in addition to those set forth in this act. Subsection (d)(2) is

intended to allow AGs to communicate freely with their federal counterparts concerning merger review in circumstances where both the states and federal agencies have access to the same confidential information.

Section 5. Reciprocity

(a) The Attorney General may disclose a Hart-Scott-Rodino form and additional documentary material filed or provided under Section 3 to the attorney general of another state that enacts the Uniform Antitrust Pre-Merger Notification Act in substantially the form approved by the National Conference of Commissioners on Uniform State Laws, including the confidentiality provisions of the Act.

(b) At least two business days before making a disclosure under subsection (a), the Attorney General shall give notice of the disclosure to the person filing or providing the form or additional documentary material under Section 3.

Comment

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

Section 6. Civil Penalty

The Attorney General may impose on a person that fails to comply with Section 3(a), (b), or (c) a civil penalty of not more than $[10,000] per day of noncompliance.

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, the AG in the first instance, and then any reviewing 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 AG's ability to engage in merger review; and (3) whether other states have, or are likely to, impose sanctions for violations of their 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.

It should be kept in mind that, while both the acquiring and acquired party to a transaction may have Hart-Scott-Rodino filing obligations, and both may also have filing obligations under this act, in some circumstances (such as a hostile takeover) the parties may file their Hart-Scott-Rodino notifications at different times, and therefore make their notifications under this act at different times.

Section 7. Uniformity of Application and Construction

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

Section 8. Transitional Provision

This [act] applies only to a pre-merger notification filed on or after [the effective date of this [act]].

Section 9. Effective Date

This [act] takes effect …

UNIFORM LAW COMMISSION UNIFORM ACT ON PRE-MERGER NOTIFICATION

Dan Robbins
CCUSL Commissioner
ULC Antitrust Drafting Committee Chair
June 20, 2024

EX 13

Introduction

- CCUSL since 2007
- ULC – nation body – 50 states and D.C., USVI and Puerto Rico
  - *Purpose – Uniform Laws – UCC, UTSA – 6,000 enactments*
  - *Board Chair – 2019-21*
  - *President – 2021-23*
  - *Antitrust Drafting Committee Chair – 2023-now*
- Day job – in-house antitrust compliance lawyer at MPA, a global trade association
  - *Understand antitrust law around the world and ensure employees respect it*

Context

- Since 1976, the federal Hart Scott Rodino ("HSR") Act has required companies engaging in covered mergers and acquisitions to provide pre-merger notification to the FTC and DOJ.
- The HSR filing contains basic information about the merger, together with supplemental documentary information required by FTC regulations.
  - *FTC is currently in process of increasing amount of information needed to be submitted.*
    - i.e., information about merger's effects on workers.
- HSR makes filings confidential and FOIA-exempt.
- State Attorneys General do not have access.
  - *If they learn of transaction, may be able to subpoena HSR file or negotiate a waiver with merging parties, but that process can cause significant expense and delay.*
  - *Given that HSR process and agency investigation moves quickly, AGs are often at a significant disadvantage*

Goals and Spirit of Uniform Act

- Improve process of State participation in merger review by allowing State AGs to obtain immediate access to HSR filings, subject to same confidentiality restrictions as apply to federal agencies.
- Allow State AGs to participate in merger review with same information and on same time-frame as federal agencies, without imposing additional burdens on merging parties.
- This is a “good government” Act that takes no position on ongoing debates about the overall direction of antitrust law.

Process

- Idea suggested by Diana Moss, now with the Progressive Policy Institute
- Study Committee consulted with broad and **balanced** range of stakeholders:
  - *Input from DOJ, FTC, AGs, business groups*
- Support from AG community.
  - *Sept 27, 2023 letter to FTC from AGs of New York, Arizona, **California**, Colorado, Connecticut, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, the United States Virgin Islands, Washington, and Wisconsin:*
    - "Following the growing patchwork of State premerger notification laws and the shortcomings of the current state of affairs—where States either do not become aware of transactions affecting their jurisdictions or do not have enough time to investigate such transactions—the Uniform Law Commission has proposed 'The Antitrust Pre-Merger Notification Act,' which would create a non-burdensome mechanism for States to receive access to HSR filings at the same time as the Agencies. The anticipated effect is to facilitate early information sharing and coordination amongst States and the Agencies."
- Balance is key
  - Gianaris/NY Chamber
  - Klobuchar staff/U.S. Chamber
  - Contrast
- Balance results in passable bills, imbalance results in failed bills
  - NY (4x), MN (2x), ME (2x), NJ, PA, and MD

Mechanics

- Filing requirement triggered if:
  - *Principal place of business in state; or*
  - *Annual net sales in same line of business in state 20% of HSR filing threshold (i.e., around $24M today)*
- Must file HSR form with AG, and if PPB, must submit additional documentary material.
  - *If AG doesn't receive additional materials under PPB test, may request them.*
- No filing fee for providing materials.
- Confidentiality
- Reciprocity
  - *Receiving AG may share with any other AG whose state has passed Act.*
  - *Must give notice to merging parties.*
  - *Aspiration: AGs collaborate to set up a central database, accessible only to AGs from enacting states.*

Potential objections

- Increasing burdens on business community or AG offices.
  - *Push of a button for merging parties.*
  - *For AGs, will reduce subpoena and timing burdens and enable better collaboration and division of labor with other AGs and federal agencies.*
- Preempting other state legislation.
  - *No effect on sector-specific pre-merger notification requirements.*
    - CA Senate Bill 184 (2022) (health care)
    - CA Assembly Bill 853 (2023) (retail)

Next Steps

- Final approval by the 50 states in July

- Introductions beginning in January 2025

UNIFORM LAW COMMISSION UNIFORM ACT ON PRE-MERGER NOTIFICATION

Dan Robbins
CCUSL Commissioner and ULC Antitrust Drafting Committee Chair
June 20, 2024

EX 21