Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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UNIFORM ANTITRUST PRE-MERGER NOTIFICATION ACT

Summary

The Uniform Antitrust Pre-Merger Notification Act improves the efficiency of the state merger review process for all parties and enhances certainty for businesses. The Act creates a process for state attorneys general to receive Hart-Scott-Rodino (HSR) forms and the additional documentary material filed with them. HSR forms, and the additional documentary material filed with them, contain information about proposed transactions and are used to review the potential anticompetitive effects of the proposed transaction. While state AGs have the authority to enforce federal and state merger law, they do not currently have access to HSR forms and additional documentary materials absent costly and time-consuming subpoenas. This delay reduces certainty for parties seeking to close their deals.

Section 3 of the uniform act requires a person filing a pre-merger notification with the federal government to submit contemporaneously the same materials to the state AG if:

- The person has a principal place of business in the state; or
- The person or a person it controls directly or indirectly had annual net sales in the state of goods or services involved in the transaction of at least 20% of the filing threshold.

An AG may not charge a person a filing fee for filing the form or additional documentary material with the AG.

Section 4 of the act imposes confidentiality restrictions on the AG who receives the HSR materials. Under the act, the AG may not make public or disclose the HSR form, the additional documentary material, the proposed merger, or even the fact that the documents were provided. The AG may, however, share HSR materials with the federal agencies conducting antitrust investigations and any other AG whose state has also adopted the uniform act and its confidentiality restrictions.

A person that fails to comply with the filing requirements of the act may face a civil penalty of not more than $[10,000] per day of noncompliance.

For more information about the Uniform Antitrust Pre-Merger Notification Act, please contact ULC Legislative Program Director Kaitlin Wolff at (312) 450-6615 or kwolff@uniformlaws.org.

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

Uniform Antitrust Pre-Merger Notification Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH PREFATORY NOTE AND COMMENTS

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ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 133rd year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

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- ULC keeps state law up to date by addressing important and timely legal issues.

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Antitrust Pre-Merger Notification Act

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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. *See California v. American Stores Co*., 495 U.S. 271 (1990). 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 because federal approval does not foreclose a later state challenge. For example, in the *American Stores* case noted above, California sued to block a merger that the Federal Trade Commission had already approved.

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, 2024 and new merger rules have been proposed in California by stakeholders in an antitrust review process managed by the California Law Revision Commission.

The Uniform 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 within one business day of 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 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.

Similarly, this act is not intended to supplant or preempt existing sector specific pre-merger reporting requirements that many states have in certain areas (for example, health care) and the act is not intended to limit a state's ability to challenge smaller local mergers that do not meet the HSR thresholds.

Uniform Antitrust Pre-Merger Notification Act

Section 1. Title

This [act] may be cited as the Uniform 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 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.

(9) "Uniform Antitrust Pre-Merger Notification Act" means the Uniform Antitrust Pre-Merger Notification Act approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws.

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 a complete electronic copy of the Hart-Scott-Rodino form with the Attorney General not later than one business day after filing of the pre-merger notification 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 shall provide a secure means to receive and store the materials required to be submitted to the Attorney General by this section.

(e) 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 HSR 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.

This 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. In the Supreme Court's unanimous decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010), it described the term as follows:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

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 HSR that the Federal Trade Commission adjusts annually by rule pursuant to Section 7A(a)(2) of the Clayton Act, as amended by the HSR. 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 an HSR pre-merger notification in 2024 and did not have its principal place of business in a state that enacted 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 HSR, both persons might be required to file with the same 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 within one business day of the HSR filing with the federal government. 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 time allowed for a party to submit that material upon receipt of a 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).

Subsection (d) emphasizes the importance of data security. Subsection (d) requires the AG to provide a secure method to receive and store all materials filed with the AG under this section.

The spirit of this act is to facilitate more timely and efficient AG receipt of materials relating to potentially interesting mergers without imposing significant additional burdens on the business community. Accordingly, subsection (e) 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 (e) 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 (e) 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 in connection with the transaction

notified under the act, such an investigation will begin promptly upon receipt of all the information provided under the act consistent with the act's goals of enhanced efficiency and reduced cost and uncertainty. Unreasonable delay will also adversely affect the state's ability to challenge a transaction. For example, see *State of New York v. Meta Platforms, Inc.*, 66 F.4th 288, 301 (D.C. Cir. 2023) (applying laches to dismiss state challenges to Facebook's acquisition of Instagram and WhatsApp because of respective eight- and six-year delays in bringing the suit).

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;

(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; or

(5) the merger proposed in the form.

(b) A 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 a 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;

(2) preclude the Attorney General from sharing information with the Federal

Trade Commission or the United States Department of Justice Antitrust Division, or a successor agency; or

(3) preclude the Attorney General from sharing information with the attorney general of another state that has enacted the Uniform Antitrust Pre-Merger Notification Act or a substantively equivalent act. The other state's act must include confidentiality provisions at least as protective as the confidentiality provisions of the Uniform Antitrust Pre-Merger Notification Act, and the other state must provide assurances to the Attorney General that it agrees to maintain the confidentiality of the documents or information received.

(e) Except as otherwise provided by court order or other law, the Attorney General shall destroy or return the materials submitted pursuant to Section 3 not later than 120 days after the later of:

(1) the close of the transaction subject to disclosure under Section 3; or

(2) the conclusion of any legal proceedings directly related to the transaction subject to disclosure under Section 3.

Legislative Note: *A state may need to amend its freedom of information act to conform to this act.*

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. 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 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. Subsections (d)(2) and (3) are intended to allow AGs to communicate freely with their federal and state counterparts concerning merger review in circumstances where both the states and federal agencies have access to the same confidential information. The term information in these subsections is intended to include economic and legal analyses that are commonly used in merger review. For example, one AG may wish to share an economic analysis of relevant data with federal and state counterparts to enhance efficiency and reduce wasteful duplication.

This section uses the phrase "substantively equivalent" to describe another state's law that would be sufficiently like the enacting state's law to warrant the kind of interstate collaboration envisioned by this act. Another expression—"substantially similar"—is sometimes used in legislation. The use of "substantively equivalent" instead is intended to signal that, whatever the form of another state's law, that law must contain the substantively significant components of the enacting state's law, without material alteration, for the information sharing and collaboration envisioned by this act to occur.

Finally, an explanatory comment on the relationship between subsections 4(d) and 5(a): 5(a) permits the AG of one state to share the HSR materials with the AG of another state that has adopted a substantively equivalent law. By contrast, subsection 4(d) allows for information-sharing among or between AGs who already have access to the HSR materials. This subsection was added to make clear that work product or other information derived from HSR materials may be shared with federal enforcers or other AGs whose states have enacted a substantively equivalent law, thus guaranteeing the confidentiality of the information. For example, if the AG of State A had an economist perform a regression analysis based on data provided in the HSR filing received pursuant to this act, that analysis could be shared with the AG of another state that also enacted the act, or a substantively equivalent act.

Subsection (e) imposes a deadline by which the AG must destroy or return the materials provided to it under section 3 of the act, ensuring this sensitive information remains confidential following the close of the deal or end of the relevant legal proceedings.

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 or a substantively equivalent act.

The other state's act must include confidentiality provisions at least as protective as the confidentiality provisions of the Uniform Antitrust Pre-Merger Notification Act, and the other state must provide assurances to the Attorney General that it agrees to maintain the confidentiality of the documents or information received.

(b) At least five 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 HSR 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 of this act.

Section 6. Civil Penalty

After written notice and a three-business day period to cure, the Attorney General may [impose][seek imposition of] a civil penalty of not more than $[10,000] per day of noncompliance on a person that fails to comply with Section 3(a), (b), or (c). A civil penalty imposed under this section is subject to procedural requirements applicable to the Attorney General, including the requirements of due process.

Legislative Note: *A state should determine whether to use "impose" or "seek imposition of" based on whether that state's laws permit its attorney general to impose a civil penalty directly or require the attorney general to seek imposition of a civil penalty in an appropriate proceeding.*

Comment

The sanctions provision is intended to incentivize compliance with the act without being disproportionately punitive. 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 imposed, 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 HSR 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 HSR 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 …