Government of the District of Columbia
UNIFORM LAW COMMISSION

January 7, 2025

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
The John A. Wilson Building,
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Request for introduction of the Uniform Antitrust Pre-merger Notification Act.

Dear Chairman Mendelson:

Pursuant to Rule 401(b)(1) of the Rules of Organization and Procedure for the Council, this is to request, on behalf of the District of Columbia Uniform Law Commission, that you introduce the proposed "Uniform Antitrust Pre-merger Notification Act of 2025."

The uniform act, which was approved by the Uniform Law Commission in 2024, would substantially improve the efficiency of the review of the possible anticompetitive effects of proposed mergers by the District. It does this by requiring persons who file with the federal government what is called a Hart-Scott-Rodino form and related documents ("HSR documents") to file them with the Office of the Attorney General. The bill obviates the need for the Office to file costly and time-consuming subpoenas to obtain these documents and helps the parties to the transaction by reducing delay and uncertainty. The bill imposes confidentiality restrictions on the information in the HSR documents by restricting sharing of any information to federal agencies conducting investigations and the attorneys general of other states that have adopted the uniform act. Civil penalties are provided for noncompliance.

The Uniform Law Commission is making a special outreach effort to the state attorneys general to obtain enactment of this uniform act throughout the country. The uniform act has been endorsed by the American Bar Association Antitrust Law Section. This bill has been reviewed and approved by the Antitrust and Nonprofit Enforcement Section of the Office of the Attorney General for the District of Columbia.

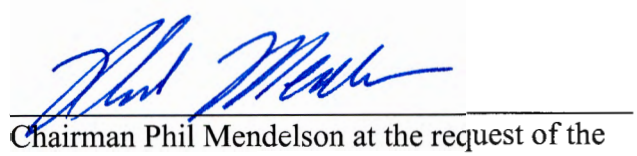
A proposed "Uniform Antitrust Pre-merger Notification Act of 2025" is being filed with this letter. In addition, the following documents have been filed: (1) a summary of the uniform act; (2) a statement as to why the uniform act should be adopted; and (3) the official version of the uniform act with comments.

I would be pleased to answer any questions and to provide any additional information requested.

Sincerely,

James C. McKay, Jr.
Chair
D.C. Uniform Law Commission

cc: Uniform Law Commissioners



Chairman Phil Mendelson at the request of the
District of Columbia Uniform Law Commission

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend Subtitle II of Title 28 of the District of Columbia Code to add a new Chapter 44 to enact the Uniform Antitrust Pre-Merger Notification Act; to require a person filing a pre-merger notification with the federal government to submit contemporaneously the same materials with the Attorney General for the District of Columbia, if the person has a principal place of business in the District or the person, or person it controls, directly or indirectly had annual net sales in the District of at least 20 percent of the filing threshold; to impose confidentially restrictions with respect to these materials; to authorize the Attorney General to seek a civil penalty for noncompliance; and for other purposes.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Uniform Antitrust Pre-Merger Notification Act of 2025".

Section 2. Subtitle II of Title 28 of the District of Columbia Code is amended by adding the following new Chapter 44 to read as follows:

"UNIFORM ANTITRUST PRE-MERGER NOTIFICATION ACT

"Sec.

"4401. Short title.

"4402. Definitions.

"4403. Filing requirements.

"4404. Confidentiality.

"4405. Reciprocity.

"4406. Civil penalty.

“4407. Uniformity of application and construction.

“4408. Transitional provision.

§ 28-4401. Short title.

“This act may be cited as the Uniform Antitrust Pre-Merger Notification Act.

§ 28-4402. Definitions.

In this act:

“(1) “Additional documentary material” means the additional documentary material filed with a Hart-Scott-Rodino form.

“ (2) “Attorney General” means the Attorney General for the District of Columbia.

“ (3) “District” means the District of Columbia.

“(4) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“(5) “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.

“(6) “Hart-Scott-Rodino Act” means Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. Section 18a.

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

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

“(9) “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.

"(10) "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.

"§ 28-4403. Filing requirements.

"(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 the District; or

"(2) The person or a person it controls directly or indirectly had annual net sales in the District 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) of this section 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) of this section 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.

"§ 28-4404. Confidentiality.

"(a) Except as provided in subsection (c) of this section or § 28-4405, the Attorney General may not make public or disclose:

"(1) A Hart-Scott-Rodino form filed under § 28-4403;

"(2) The additional documentary material filed or provided under § 28-4403;

"(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 § 28-4403, 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 the Freedom of Information Act, D.C. Code § 2-531 *et seq.*

"(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, provided that the other state's act includes confidentiality provisions at least as protective as the confidentiality provisions of the Uniform Antitrust Pre-Merger Notification Act.

"§ 28-4405. Reciprocity.

"(a) The Attorney General may disclose a Hart-Scott-Rodino form and additional documentary material filed or provided under § 28-4403 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.

"(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§ 28-4403.

"§ 28-4406. Civil penalty.

"The Attorney General may seek imposition of a civil penalty of not more than $10,000 per day of noncompliance on a person that fails to comply with § 28-4403 (a), (b), or (c) by filing an action in the Superior Court of the District of Columbia. A civil penalty imposed under this section is subject to procedural requirements applicable to the Attorney General, including the requirements of due process.

"§ 28-4407. 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.

"§ 28-4408.Transitional provision.

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

Sec. 3. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement

required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective Date

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

111 N. Wabash Ave.
Suite 1010
Chicago, IL 60602
(312) 450-6600 tel
www.uniformlaws.org

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.

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM ANTITRUST PRE-MERGER NOTIFICATION ACT

The Uniform Antitrust Pre-Merger Notification Act improves the efficiency of the state merger review process for all parties. Currently, states may enforce existing merger law. However, they don't receive the federal Hart-Scott-Rodino filings that allow the federal agencies to assess mergers without litigating subpoenas. This creates unnecessary costs and delays for all parties. The delays also reduce business certainty concerning deal closure. The uniform act solves these problems by creating a mechanism for a state attorney general to receive access to HSR filings on a confidential basis. Below are some key features of this uniform act:

- ***Improves your attorney general's ability to investigate potential mergers while reducing unnecessary costs and enhancing business certainty.*** State attorneys general have the right to challenge anticompetitive mergers under federal law, but they do not have the same access to pertinent information, Hart-Scott-Rodino ("HSR") filings, as the federal government. This often leaves AGs playing catch-up and issuing subpoenas to gain access to the filings. This creates unnecessary expenses for the AG and the merging parties while the inherent delays in the process reduce business certainty. This uniform act changes the status quo by requiring a party to submit HSR filings to the AG at the same time as the federal government, better equipping the AG to assess the proposed transaction.

- ***Imposes no significant burdens on businesses or state attorneys general.*** This uniform act does not require AGs to conduct investigations based upon the HSR filings they receive, it merely ensures they have access. Similarly, businesses do not have to create anything new, they simply must share existing files. Section 3 eliminates additional business expenses by prohibiting a filing fee for providing the HSR form or additional documentary material to the AG.

- ***Provides strong confidentiality protection to businesses.*** Section 4 of the act establishes clear confidentiality rules to ensure the HSR materials are only used by the AG for legitimate law enforcement and investigatory purposes. The act's protections mirror the protections imposed on the federal agencies that receive the HSR filings.

- ***Offers reciprocity to enacting states.*** Section 5 of the uniform act permits an AG to disclose a HSR form and additional documentary material to the AG of another state if the other state has enacted the uniform act. The other state's act must include confidentiality provisions that are at least as protective as the provisions of the uniform act. This reciprocity is meant to encourage early information sharing and coordination among state AGs to reduce duplication and enhance timely and efficient deal review.

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.

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

September 16, 2024

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.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience because the organization is made up of representatives from each state, appointed by state government.

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

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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:

Dan Robbins	California, *Chair*
Steven L. Willborn	Nebraska, *Vice Chair*
Levi J. Benton	Texas
William H. Clark Jr.	Pennsylvania
Parrell D. Grossman	North Dakota
Jess O. Hale	Tennessee
Lyle W. Hillyard	Utah
Ryan Leonard	Oklahoma
Kimberly A. Lowe	Minnesota
John J. McAvoy	District of Columbia
Cory J. Skolnick	Kentucky
Nora Winkelman	Pennsylvania, *Division Chair*
Timothy J. Berg	Arizona, *President*

Other Participants

Daniel A. Crane	Michigan, *Reporter*
Deborah A. Garza	Virginia, *American Bar Association Advisor*
Sohan Dasgupta	District of Columbia, *American Bar Association Section Advisor*
Emilio Varanini	California, *American Bar Association Section Advisor*
Diane Boyer-Vine	California, *Style Liaison*
Tim Schnabel	Illinois, *Executive Director*

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

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 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 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.

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 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 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 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).

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 (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 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.

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.

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.

(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 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 provisions of this act.

Section 5(b) is intended to allow a party to challenge the disclosure when appropriate.

Section 6. Civil Penalty

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 …