The Threshold

Mergers and Acquisitions Committee

September 12, 2024

This edition of the Threshold discusses the current and proposed roles of states in premerger notification and approval. It also discusses pending proposals aimed at situating state attorneys general more equally with federal antitrust enforcers in the U.S. with respect to premerger notification.

The Threshold serves as a platform for various perspectives. The opinions and viewpoints expressed in this article are solely those of the authors. Such opinions and viewpoints do not necessarily reflect the opinions or viewpoints of – nor are they endorsed by – the Section, the M&A Committee, or the compilers or editors of this publication.

* * *

Momentum Grows for More Robust State Enforcement in Merger Reviews

By: Christy A. Matelis[1]

States increasingly seek to expand their enforcement toolboxes. The latest proposals take the form of state-level premerger notification regimes that would run in parallel to the federal Hart-Scott-Rodino ("HSR") Act and regulations. Parties to M&A transactions need to understand how transactions might proceed in a new environment of multiple, potentially divergent reviews and enforcement. Ongoing legislative efforts to implement state-level notification regimes, including requirements to obtain state merger approvals, foreshadow increased state enforcement.

New State-Level Notifications

Similar to the federal government,[2] states long have required notice for transactions in certain industries. Many states have recently adopted notification requirements for "material changes" in ownership resulting from healthcare transactions, for example.[3]

[1] The opinions expressed in this article are solely those of the author and do not reflect the opinions or viewpoints of Orrick, Herrington & Sutcliffe LLP or its clients.

[2] Congress has empowered agencies by enacting industry-specific competition laws, such as granting the Department of Transportation the authority to review transactions that prohibit unfair methods of competition or anticompetitive practices in air transportation. 49 U.S.C. § 41712.

[3] *See, e.g.*, Cal. Health & Saf. Code § 127507 (healthcare entities); Cal. Code § 14700 (retail grocery and pharmacy transactions); Colo. Rev. Stat. §§ 6-19-102 – 6-19-407; Conn. Gen. Stat. Ann. § 19a-486i; Haw. Rev. Stat. § 323D-72; Illinois Public Act 103-0526; Mass. Gen. Laws ch. 6D, § 13; N.Y. Pub. Health Law §§ 4550 – 4552; Wis. Stat. § 165.40.

Some states, however, are seeking to require industry-agnostic notifications.[4] This July, the Uniform Law Commission ("ULC")[5] approved the Uniform Antitrust Pre-Merger Notification Act (the "Model HSR Act"),[6] modeled after the federal HSR Act. If enacted by states, it would require merging parties to submit an HSR notification to the State Attorney General ("State AG") contemporaneously with a filing to the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") if the filing party has a principal place of business or annual net sales in the state of at least 20 percent of the HSR size-of-transaction threshold (currently about $24 million).[7]

Although the proposed Model HSR Act does not require a filing fee, states could add one. The proposed Model HSR Act provides for civil penalties up to $10,000 per day for each day of noncompliance.[8] Like the federal HSR Act, the proposed Model HSR Act would protect filings from public disclosure, yet State AGs would be free to communicate and share information, without waivers from the merging parties, with their federal counterparts and other states that adopt the proposed Model HSR Act.[9]

Enactment of the proposed Model HSR Act would materially impact merger reviews by imposing a notice requirement at the state-level. While states already have the ability to challenge transactions under state or federal law, they do not automatically receive access to HSR filings like the FTC and the DOJ. Today, State AGs must negotiate confidentiality agreements with merging parties and submit waivers to their federal partners to receive access. The proposed Model HSR Act is intended to put State AGs on more equal footing with federal enforcers.

While no state has yet adopted the proposed Model HSR Act, it was approved by an overwhelming majority of the ULC.[10] Governors appoint most commissioners on the ULC, and some commissioners also serve as state legislators.[11] It is worth noting the close connection between the ULC and state legislators, as these lawmakers are ideally positioned to introduce and propel enactment of the proposed Model HSR Act in their respective state legislatures.

New State-Level Approval Requirements

In addition to premerger notifications, some states—similar to the federal government[12]—require parties obtain industry-specific state premerger approval(s) for a proposed transaction. For instance, since 1997, Rhode Island[13] has required approval from its State AG and its Department of Health for hospital transactions.[14]

---

[4] Legislators in New York and Pennsylvania have proposed bills requiring merger pre-notifications across all industries. New York State Senate Bill 6748 and Pennsylvania House Bill 2012.

[5] The Uniform Law Commission began in 1892 and is comprised of more than 350 practicing lawyers, including judges, legislators and legislative staff, and law professors from every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Uniform Law Comm'n, About Us, https://www.uniformlaws.org/aboutulc/overview.

[6] Uniform Law Comm'n, Two New Uniform Acts and Amendments to Acts Approved at ULC's 133rd Annual Meeting (July 24, 2024) https://www.uniformlaws.org/discussion/two-new-uniform-acts-and-amendments-to-acts-approved-at-ulcs-133rd-annual-meeting.

[7] The current size-of-transaction threshold is $119.5 million (adjusted annually), and the proposed Model HSR Act recommends 20 percent of that amount, which is approximately $24 million. Federal Trade Commission, New HSR Thresholds and Filing Fees for 2024, FTC (Feb. 2024), https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024; § 3(a)(2) of the Uniform Antitrust Pre-Merger Notification Act ("Uniform Law Comm'n, Proposed Draft 2024").

[8] Uniform Law Comm'n, Proposed Draft 2024 at § 6.

[9] *Id.* at § 4.

[10] Emilio Varanini, LinkedIn (July 27, 2024), https://www.linkedin.com/posts/emilio-varanini-85474a11_ratified-uniform-antitrust-pre-merger-notification-activity-7221985091592318977-P_cl ("The final vote was 45 in favor, 1 against, and 7 absent. The one against was Alabama. The seven absent were Alaska, Georgia, Massachusetts, New York, Puerto Rico, New Hampshire, and Maine.").

[11] Uniform Law Comm'n, About Us, https://www.uniformlaws.org/aboutulc/overview.

[12] For example, Congress enacted the Bank Merger Act of 1960 to empower the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Federal Reserve Board to evaluate bank transactions and prohibits the federal agencies from approving transactions that would create a monopoly or further a conspiracy to monopolize banking. 12 U.S.C. § 1828. Generally, federal and state antitrust enforcers are required to litigate to block a transaction and do not have approval rights.

[13] R.I. Gen. Laws § 23-17.14-7. *See* Hospital Conversions / Merger Program, Department of Health, State of Rhode Island, https://health.ri.gov/programs/hospitalconversionsmerger.

[14] New Mexico recently enacted a law requiring parties to obtain approval from the Office of Superintendent of Insurance for hospital mergers. 2024 Health Care Consolidation Oversight Act (Senate Bill 15).

More recently, the Oregon legislature enacted similar requirements covering a much broader swath of healthcare transactions. The Oregon Health Authority ("OHA") requires notice of pending healthcare deals and imposes a waiting period of 30 days for a preliminary review.[15] If OHA has concerns, it can extend its review for up to 180 days, which can be tolled if information is required from the parties.[16] At the conclusion of the review, OHA has the authority to approve, to approve with conditions, or to deny the pending transaction.[17] OHA's review is independent from any merger analysis conducted by the Oregon Attorney General. Further, OHA considers factors in addition to standard antitrust analysis, including impacts on equity and access to healthcare for rural and underserved communities.

Meanwhile, a bill passed in the California legislature would subject certain healthcare transactions involving private equity and hedge funds to notice and approval by the California Attorney General.[18] If signed by Governor Gavin Newsom, the law would take effect on January 1, 2025.

Plan for Increased State Enforcement

States have a history of challenging transactions when federal enforcers have not,[19] and states increasingly act on their own even when federal counterparts take action.[20] If the proposed Model HSR Act is adopted, states will have more opportunities to independently assess and challenge transactions that affect their citizens.

It is likely there will be continued divergence among state and federal enforcers. We can predict that State AGs may not necessarily wait for federal enforcers to challenge or settle transactions. In so doing, State AGs may consider factors beyond those featured in federal challenges, such as whether a proposed transaction may have disparate impacts on state constituents. Additionally, State AGs may be moved by unique, state-specific political factors that drive increased enforcement.

As of now, few states have enacted sweeping Model HSR Acts or additive deal review processes. That will change. Parties should monitor these legislative efforts and assess whether a filing or other agency notification or approval is required in states that pass these laws.

The M&A Committee's Threshold is compiled and edited by Rubin Waranch

[15] ORS § 415.501(5).

[16] ORS § 415.501(7)(a).

[17] ORS § 415.501(18).

[18] California Assembly Bill (AB) 3129.

[19] *See California v. American Stores Co.*, 494 U.S. 271, 275 (1990); *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747 (1st Cir. 2003).

[20] *Washington v. Kroger Co.*, No. 24-2-00977-9 (Wash. Super. Ct. 2024), *Colorado v. Kroger Co.*, No. 2024CV30459 (Colo. Dist. Ct. 2024); *District of Columbia v. Amazon, Inc.*, No. 22-CA-001775 (D.C. Sup. Ct. 2021); *California v. Amazon.com, Inc.*, Docket No. CGC22601826 (Cal. Super. Ct., filed Sept. 15, 2022); *State of Arizona v. RealPage Inc. et al.*, No. CV-2024-003889 (Ariz. Sup. Ct., Maricopa County, filed Feb. 28, 2024); *District of Columbia v. Real Page Inc.*, No. 2023-CAB-006762 (D.C. Sup. Ct. 2023).