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Washington State Adopts First Broad State Antitrust Premerger Notification Act and Filing Requirement

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Effective July 27, 2025, any person that files a Hart-Scott-Rodino (HSR) Act Notification and Report Form (HSR Form) with the Federal Trade Commission (FTC) and the Department of Justice (DOJ) must also submit an electronic copy of the HSR Form to the Washington State Attorney General (Attorney General) if it meets any one of three additional jurisdictional tests. There is no filing fee associated with the filing.

Jurisdictional Requirements

Washington State's Antitrust Premerger Notification Act (the Act) sets forth three alternative jurisdictional tests that trigger the state notice requirement for persons subject to the HSR Act's filing requirements:

1. the person has its principal place of business in the State of Washington;
2. the person (or a person that it controls directly or indirectly) had annual net sales in the State of Washington of the goods or services involved in the transaction of at least 20% of the HSR Act's $126.4 million filing threshold (as adjusted annually); or
3. the person is a healthcare provider or provider organization (as defined in the Revised Code of Washington) conducting business in the State of Washington.

"Principal place of business" is not defined by the Act. It is not necessarily the state of incorporation or registration but in corporate law generally refers to the place where the corporation's highest level officers direct, control and coordinate the corporation's activities.

Filing Requirements, Confidentiality Protections, and Penalty for Failure to Comply

If the person has its principal place of business in the State of Washington, it must provide its HSR Filing (the HSR Form and the documentary attachments) to the Attorney General contemporaneously with its filing with the FTC and DOJ. If the person does not have its principal place of business in the State of Washington, it must still provide its HSR Form to the Attorney General at the time of its filing with the FTC and DOJ, but is not required to include the documentary attachments required by an HSR Filing. However, the Attorney General has the authority to require such persons to provide the HSR Filing within seven (7) days of a request.

The HSR Form, the HSR Filing, the fact of a notifiable transaction, and the notice to the Attorney General are confidential and not subject to public release under Washington's Freedom of Information Act. With a protective order, the HSR Form and HSR Filing may be used in an administrative or judicial proceeding related to the transaction. The Act allows the Attorney General to share an HSR Form, or HSR Filing, with any Attorney General of a state that has adopted the same or similar state premerger notification filing requirement, and contains similar confidentiality requirements. The Act does not allow for sharing with any competition agencies or other law enforcement agencies outside the United States; merging parties may grant such rights, however.

Any person that fails to comply with the state's notification requirement is subject to civil penalties of up to $10,000 per day, for each day out of compliance.

Impact of Washington State's Notification Requirement

The filing with the Attorney General does not initiate a waiting period or otherwise suspend closing of the notified transaction. The Act does not grant the Attorney General authority to issue a Request for Additional Information (a Second Request) but the Attorney General can use existing investigatory tools to require the production of documents and data and to compel testimony from any person that is a party to a transaction or any relevant third party.

The Growth of State Premerger Notification Requirements

States routinely join merger (and non-merger) investigations and litigations initiated by the DOJ and FTC. Examples of joint state/federal antitrust investigations include the recent challenge by the FTC and the states of Illinois and Minnesota to the acquisition of Surmodics by GTCR, LLC; the challenge by the DOJ and the states of California, Maryland, Massachusetts, New Jersey, New York, North Carolina, and the District of Columbia to the Jet Blue/Spirit Airlines merger; and the DOJ's monopolization suit against Google, which was joined by California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia.

States also routinely initiate their own merger (and non-merger) antitrust investigations, sometimes alone, and sometimes with other states. Recent significant matters are the 2019 multi-state challenge to the T-Mobile/Sprint merger and Colorado's recent separate challenge to the Kroger/Albertsons merger (which was also challenged by the FTC and eight (8) states, plus the District of Columbia, in a separate action).

Notwithstanding the important and growing role of the states in merger investigations, Washington is the first state to adopt the Uniform Antitrust Premerger Notification Act (Uniform Act), promulgated by the Uniform Law Commission in July 2024. More states seem likely to adopt broad premerger notification requirements in the future. California, Colorado, Hawaii, Nevada, Utah, West Virginia, and the District of Columbia are actively considering adoption of the Uniform Act. New York is again considering changes to the Donnelly Act (its general antitrust act) to include a premerger notification program, significantly more burdensome than the requirements of the Uniform Act. Maine already requires 90 day notice of consummation of an acquisition of the assets of a retail gasoline business or the acquisition of the assets of a heating oil business; this notification requirement initiated the FTC's and Maine's review of and challenge to Irving Oil's acquisition of petroleum storage terminals from Exxon.

Many States Require Premerger Notification for Healthcare Transactions

Many states have adopted premerger notification statutes for healthcare transactions. Washington's healthcare premerger notification statute requires sixty (60)-day pre-consummation notice of mergers, acquisitions, or contracting affiliations between two (2) or more hospitals, hospital systems, or provider organizations that operate within the state (subject to certain jurisdictional thresholds). More than a dozen other states have mandatory merger notification filing requirements for healthcare transactions, including California (for health care entities and retail drug firms), Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, and Vermont. The Texas legislature is considering a healthcare facility premerger notification requirement.

These healthcare-specific premerger notification requirements capture, and are intended to capture, transactions that are unlikely to require notification to the FTC and DOJ under the HSR Act. State and federal antitrust enforcement agencies and state legislatures are paying close attention to empirical literature which suggests transactions that do not meet the HSR Act's size-of-transaction filing requirement can have significant anticompetitive effects. The FTC's 2023 challenge to U.S.

Anesthesia Partners "roll-up" of anesthesiology practices in Texas is an example of a post-acquisition challenge to small value acquisitions.

Commentary on State Merger Review

State Attorneys General are increasingly active participants in antitrust merger (and non-merger) investigations. Consideration of state-level general premerger notification requirements, and the broad, and relatively recent adoption of state-level premerger notification requirements for healthcare transactions are, and will be, instrumental tools for this more aggressive push at the state level. Budget cuts for the federal antitrust agencies and the future consolidation of federal antitrust enforcement at the DOJ, if either occurs, will undoubtedly lead state Attorneys General to increase their attention to mergers that may harm competition in local and state-wide markets. This presents both a risk and opportunity for merging parties.

Local concerns, including political concerns, will influence state Attorneys General much more so than the leadership of federal agencies. Although state Attorneys General have, overall, fewer resources to devote to antitrust matters—and often use their scare resources to duplicate work done by the federal agencies—they often are tasked with identifying and investigating the local effects of transactions with national scope, e.g., the merger of integrated refiners and retail gasoline stations. Or, in transactions reportable under the HSR Act, but with strictly local effects, the federal government may defer to their evaluation of the transaction to preserve federal agency resources. An Attorney General's conclusions as to whether harm will occur at the local level, or how to remedy that harm, can be determinative of whether relief will be sought and the scope of that relief.

State Attorneys General have historically been more open to remedying anticompetitive mergers through future price regulation, rather than divestiture of assets. Additionally, transactions that raise only intrastate concerns can be immunized from challenge by state legislative action; the choice to do so is often influenced by the position of the state's Attorney General (and the Governor). When choosing to immunize a transaction, the legislature often relies on the state Attorney General to oversee the merged entity, so as to limit the mergers anticompetitive effects. The states have been active in immunizing certain healthcare transactions from antitrust review and challenge; and the FTC has been active in petitioning states not to do so, including most recently in Indiana, New York, and Texas. In an initiative announced during the first Trump Administration, the FTC's Office of Policy Planning is studying the effects of such immunity grants.

State Attorneys General are elected officials, and as such are both politicians and enforcement officers. Antitrust merger practice at the state level often requires a different approach than at the federal level. Counsel and businesses not familiar with practicing before state Attorneys General operate at a significant disadvantage.