

## ANTITRUST TRADE &amp; PRACTICE

# States Increase Their Individual Review of Merger Activity

By Karen Hoffman Lent and Kenneth Schwartz

August 18, 2025

Until recently, pre-merger notification review in the United States was conducted exclusively by the federal government pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).

Sweeping new rules that the Federal Trade Commission (FTC) unanimously approved last October—and which went into effect this past February—dramatically increased the scope of information and documents that parties must submit for certain strategic transactions, leading to a corresponding increase in the time, burden and expense of preparing HSR filings for these transactions. (More detail on these changes can be found in our previous *New York Law Journal* publication, “FTC Announces HSR Final Rulemaking Impacting Premerger Filings”)

State antitrust merger review was traditionally more restricted, as states had very limited statutes governing transaction review. State pre-merger review legislation itself was generally limited to the



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health care industry—a result of state policymakers’ efforts to increase the oversight of the health care industry in their states.

At least 35 states require hospitals, health systems, physician groups and/or private equity firms to notify authorized state entities—*e.g.*, the state attorney general or state health agency—of certain proposed mergers, facility closures or contractual affiliations.

But state pre-merger review was more limited in other industries because without a premerger notification requirement, the onus was on state attorneys general to affirmatively seek out information on transactions relevant to their state.

And while state attorneys general routinely request and receive HSR waivers from merging parties—which provide the AGs with access to the information that

merging parties provide to the FTC and Department of Justice—this access is not guaranteed.

In July 2024, the Uniform Law Commission, a legal nonprofit which drafts model state legislation, approved the Uniform Antitrust Pre-Merger Notification Act (Uniform Model Act), which put the wheels in motion for the adoption of state-level pre-merger filings beyond the health care industry.

For parties whose proposed transaction requires an HSR filing specifically, the Uniform Model Act outlines proposed requirements entailing that parties submitting HSR filings make near-simultaneous

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filings with the state authorities, providing much of the same information and documentation that the parties submit as part of their HSR filings.

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Washington became the first state to enact an all-encompassing state-specific set of pre-merger filing requirements. Passed in April of this year and effective as of July 27, the Washington State Antitrust Premerger Notification Act (APNA) introduces comprehensive premerger guidelines that largely emulate those proposed in the Uniform Model Act.

Washington Attorney General Nick Brown stated that APNA “will allow state antitrust enforcers to protect consumer interests in an even more effective way.”

To do so, the statute directs any company or individual required to make an HSR filing to also make a filing with the Washington attorney general if the filing party meets any one of several criteria, including:

(1) the person or company has a principal place of business in the state of Washington; (2) the person or company, or someone they control directly or indirectly, had annual net sales of goods or services that are involved in the proposed transaction within Washington, that were at least 20% of the HSR filing threshold (\$25.3 million for 2025); or (3) the person or company is a health care provider or provider organization that conducts business in Washington. APNA also adds additional requirements for health care transactions.

Brown called Washington “a trailblazer for the rest of the nation in adopting a premerger notification law.”

Other states are quickly following Washington’s lead and proposing premerger statutes of their own. Colorado was the first to follow Washington, approving its own very similar act in June.

Colorado’s Uniform Antitrust Pre-Merger Notification Act took effect earlier this month, and similar to Washington’s APNA, the law requires parties to submit a copy of their federal HSR filing to the Colorado attorney general if at least one of the following criteria is met: (1) a party has annual net sales of the goods or services involved in the transaction in Colorado of 20% or more of the HSR threshold; or (2) a party has its principal place of business in Colorado.

Neither Colorado’s nor Washington’s HSR law imposes a separate state filing fee or waiting period on filing parties.

This stands in stark contrast to the federal HSR regulations, which require filing parties to observe a statutory waiting period and impose filing fees that range from \$30,000 to more than \$2 million, depending on the size of the transaction. Both states have, however, implemented civil penalties of up to \$10,000 per day for a party's failure to comply.

Numerous other jurisdictions seem eager to follow Washington and Colorado, including California, Hawaii, Nevada, Utah, Washington, D.C., and West Virginia, which have all introduced similar bills. The pending legislation in most of these states emulates

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the laws enacted in Washington and Colorado and the language of the Uniform Model Act.

New York has similar, albeit somewhat broader, legislation pending. If enacted, New York's bill (S00335) would require, with limited exceptions, that "any person conducting business in the state" who is "required to file" under the federal HSR Act simultaneously provide the same information to the New York attorney general.

Additionally, the bill would require the attorney general to "consider such transaction's effects on labor markets, including but not limited to effects on workers' countervailing leverage, by establishing a process for affected workers or representatives designated by affected workers to meaningfully comment on such transactions[.]"

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While these laws may resemble the legislation passed in Colorado and Washington, there is no guarantee that future premerger laws will be similar. State legislatures are not bound by the guidelines of the Uniform Act, which could result in significant variation amongst states.

Indeed, while even Colorado's and Washington's statutes are similar, they are not identical. (For example, Washington's APNA requires filings for health care provider transactions, a requirement that is absent from Colorado's otherwise similar statute.) Dealmakers should consider not only the possible impact of the Washington and Colorado laws, but also the likelihood of additional, possibly divergent, state-level enforcement in the near future.

Because the growing trend toward more coordinated pre-merger enforcement by state attorneys general is unlikely to abate soon, those advising parties involved in subjected transactions may want to consider addressing any changes to costs and timeline resulting from the resources and time necessary to comply with multiple reviewing schemes by numerous federal and state antitrust enforcement offices.

As this space continues to change, those involved in upcoming transactions should consider being cautious in reviewing state premerger requirements for each state that could be relevant to the transaction to ensure compliance.