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Colorado Joins the "Baby" HSR Trend

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State attorneys general (AGs) have a legal right to challenge anticompetitive mergers, both under the federal Clayton Act and their own state antitrust laws. And in recent years, state AGs have played increasingly larger roles in challenging mergers, either in parallel with federal agencies, or on their own. However, AGs do not automatically have access to the filings submitted to the Department of Justice and Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act). And the HSR Act's strict confidentiality provisions prohibit the federal agencies from sharing HSR filings with AGs unless the parties agree to a waiver.

In light of all of this, in 2024, the Uniform Law Commission (ULC) published a model act that states could use to obtain HSR filings for mergers that had some substantial tie to or impact on their state. Since then, several states introduced "baby" HSR acts based on the ULC model. Only two states have actually passed those acts. Washington State was the first to do so. And now Colorado has become the second state to enact a "baby" HSR act. Colorado's Uniform Antitrust Pre-Merger Notification Act requires certain parties who submit HSR premerger filings to the federal government to provide that same information to the state. Similar bills—mirroring the ULC model act—are currently pending in several other states, including California, Hawaii, Nevada, Utah, West Virginia and the District of Columbia.

COLORADO'S UNIFORM ANTITRUST PRE-MERGER NOTIFICATION ACT (THE ACT) FILING TRIGGERS

Colorado's Act requires a person filing a pre-merger notification with the federal government under the federal HSR Act to contemporaneously file a complete electronic copy of the HSR filing with the Colorado AG if one of the following applies:

1. The person has their "principal place of business" in Colorado.
2. The filing party directly or indirectly has annual net sales of the goods or services involved in the transaction in the state of at least 20 percent of the applicable HSR size of transaction filing threshold.

The Act does not define "principal place of business," but the commentary to the ULC model act finds 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." The Act also does not explain how the net sales analysis should be conducted. The ULC model act commentary simply notes that if the net sales were not in the same goods or services as those involved in the transaction, there would be no reporting requirement. For reference, in 2025 the minimum size of transaction threshold is $126.4 million. As a practical matter, a party that makes an HSR filing in 2025 and did not have its principal place of business in Colorado would need to determine if its annual net sales in Colorado in the goods and services related to the transaction were at least $25.28 million.

ADDITIONAL KEY ELEMENTS

- The Act requires the Colorado AG to keep the filing confidential, subject to specified exceptions. The AG is permitted to share the filing information with federal antitrust agencies and other state AGs whose states have enacted substantively similar laws with equivalent confidentiality provisions. Since Washington and Colorado have enacted substantially similar laws, they may share filings with each other, after giving the filing party notice.
- The Colorado AG is authorized to impose a civil penalty of no more than $10,000 per day on any person that fails to comply with the Act.
- The filing obligation only applies to the person that meets the Act's criteria. Therefore, there may be instances where only one party in a transaction will have to submit their HSR filing to the AG.
- There is no Colorado filing fee (unlike the federal HSR Act).

CONCLUSION

The recent changes to the federal HSR form require much more information from filing parties, which have already created additional timing and risk issues for merging parties. These issues will only increase as more states consider and adopt their own filing requirements based on the ULC model act. Furthermore, with earlier access to HSR filings, state AGs will be able to engage merging parties on potential issues much earlier. Merging parties should be proactive early in the transaction process about understanding what state filing requirements may apply and consider what unique issues and concerns state AGs may raise. All of these concerns should inform parties' negotiations around antitrust risk allocation provisions in the transaction documents.

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For more information on Colorado's new pre-merger notification requirements under the Uniform Antitrust Pre-Merger Notification Act, please contact Jeetander Dulani, Nicci Warr, Scott Claassen, Vicki Smith, Heather Franco, or the Stinson LLP contact with whom you regularly work.

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