HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 705 Mergers and Acquisitions Reporting
SPONSOR(S): Grall
TIED BILLS: **IDEN./SIM. BILLS:** SB 1112

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee	15 Y, 0 N	Wright	Anstead
2) Appropriations Committee	25 Y, 0 N	Saag	Pridgeon
3) Commerce Committee			

SUMMARY ANALYSIS

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong, it can stifle competition, leading to higher prices and harm to consumers. Antitrust law exists to protect consumers by promoting competition in the marketplace.

The U.S. Congress, and many states, have passed several laws to help promote competition by outlawing unfair methods of competition. One such law is the Hart-Scott-Rodino Act (HSRA), which requires entities to provide certain federal government agencies with information about large mergers and acquisitions before they occur, in a notification form called the "Notification and Report Form for Certain Mergers and Acquisitions" (HSRA filing).

Currently, the Florida Office of the Attorney General (OAG) does not receive notice of HSRA filings unless they are voluntarily provided by the combining entities or discovered through public sources. In addition, such sources are not generally made publicly available by the federal government.

The bill requires any entity conducting business in the state to provide notice to the OAG that it has submitted an HSRA filing at the same time the HSRA filing is filed with the federal government.

The bill may have an indeterminate, but likely insignificant impact on workload within the OAG. However, this minimal impact can be absorbed within existing resources. The bill has no impact on local governments.

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Antitrust Law

Healthy competition in economic markets keeps prices low and quality high for consumers. When one entity becomes too strong or entertains unfair methods of competition, it can stifle competition, leading to higher prices and harm to consumers. Antitrust law exists to protect competition, but not necessarily individual competitors in economic markets, based on the idea that an unregulated market will lead to the creation of coercive monopolies.[1]

Federal antitrust law includes the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act. These laws are enforced in federal district court[2] by the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), state Attorneys General, and private plaintiffs. Antitrust case law is well-developed, and it is often difficult to distinguish aggressive, pro-competitive conduct—which is legal—from predatory, anti-competitive conduct.[3]

The Clayton Act[4] prohibits specific business actions, including mergers and acquisitions, which may substantially lessen competition. To determine whether a merger violates the Clayton Act, a court must decide whether the merger is likely to create an appreciable danger of anticompetitive effects. [5]

The Sherman Antitrust Act[6] prohibits any attempt to restrain trade or form a monopoly in a predatory manner. A monopoly has two elements: (1) monopoly power and (2) willful acquisition or maintenance of that power, as opposed to power naturally resulting from a superior product, acumen, or historic accident. Penalties for violating the Sherman Act include up to ten years' imprisonment and a fine up to $100 million for a corporation or $1 million for any other person.[7]

The Florida Antitrust Act of 1980[8] is intended to complement federal antitrust law in order to foster effective competition. Implemented by the Office of the Attorney General (OAG), it essentially mirrors the federal Sherman Act, and prohibits:[9]

- Every contract, combination, or conspiracy in restraint of trade or commerce;[10] and
- Monopolization or attempted monopolization of any part of trade or commerce.[11]

A Florida antitrust law violation is punishable by up to three years' imprisonment and fines up to $1 million for a corporation and $100,000 for any other person.[12] There is also a private right of action for any person injured by certain antitrust violations.[13]

Florida law does not provide a corollary to the federal Clayton Act, which specifically targets mergers and acquisitions that may lessen competition. However, the Attorney General considers the Florida

[1] John J. Miles, *Antitrust Primer*, 20140513 AHLA Seminar Papers 1 (2014) (The purpose of antitrust law is to "protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.").
[2] Steven Fox, *Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes*, The Florida Bar, Business Litigation in Florida (2017) (Federal district courts have exclusive jurisdiction over federal antitrust actions).
[3] Animesh Ballabh, *Antitrust Law: An Overview,* 88 J. Pat. & Trademark Off. Soc'y 877 (2006); John J. Miles, Antitrust Primer, 20140513 AHLA Seminar Papers 1 (2014).
[4] 15 U.S.C. § 18;
[5] *See also Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993) (discussing how plaintiff's establishment of a prima facie case on statistical evidence is first step in a court's analysis); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).
[6] 15 U.S.C. §§ 1 et seq.
[7] 15 U.S.C. § 1.
[8] Ss. 542.15 – 542.36, F.S.
[9] S. 542.16, F.S.
[10] S. 542.18, F.S.
[11] S. 542.19, F.S.
[12] S. 542.21, F.S.
[13] Ss. 542.21 and 542.22, F.S.

Antitrust Act of 1980 and the Florida Deceptive and Unfair Trade Practices Act broad enough to encompass those types of violations.[14]

Premerger Notification Program

The Hart-Scott-Rodino Act[15] (HSRA), an amendment to the Clayton Act, established the federal Premerger Notification Program (PNP), which provides the FTC and the DOJ with information about large mergers and acquisitions before they occur.[16] The PNP was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred. Prior review under the PNP enables the FTC and the DOJ to determine which acquisitions are likely to be anticompetitive and to challenge them at a time when remedial action is most effective.[17]

The parties to certain proposed transactions must submit premerger notification to the FTC and DOJ. Premerger notification involves completing the "Notification and Report Form for Certain Mergers and Acquisitions" (HSRA filing) with information about each company's business.[18]

HSRA requires persons contemplating proposed business transactions that satisfy certain size criteria to report their intentions to the enforcement agencies before consummating the transaction. If the proposed transaction is reportable, then both the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the enforcement agencies and wait a specific period of time before consummating the proposed transaction. During that waiting period, the enforcement agencies review the antitrust implications of the proposed transaction. Whether a particular transaction is reportable is determined by application of HSRA, the related rules, and formal and informal staff interpretations.

As a general matter, HSRA and the related rules require both acquiring and acquired persons to file notifications under the PNP if all of the following conditions are met:[19]

- As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests (NCI) and/or assets of the acquired person valued in excess of $200 million (as adjusted), regardless of the sales or assets of the acquiring and acquired persons ; or
- As a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, NCI and/or assets of the acquired person valued in excess of $50 million (as adjusted) but at $200 million (as adjusted) or less; and
- One person has sales or assets of at least $100 million (as adjusted); and
- The other person has sales or assets of at least $10 million (as adjusted).

Florida's Role in Premerger Actions

State Attorneys General, including Florida's, have power under the Clayton Act to independently sue to enjoin a merger or acquisition. But, according to industry experts, State Attorneys General (State AGs) do not have access to the same investigative tools as federal enforcers, such as automatically receiving HSRA filings. For this reason, State AGs more typically allow the federal agencies to take the lead in merger investigations and enforcement actions.[20]

[14] Florida Attorney General, *Antitrust*, http://myfloridalegal.com/antitrust (last visited Feb. 7, 2022).
[15] 15 U.S.C. § 18a.
[16] Federal Trade Commission, *Premerger Notification Program*, Premerger Notification Program | Federal Trade Commission (ftc.gov) (last visited Feb. 7, 2022).
[17] FTC Premerger Notification Office, *Introductory Guide I*, p. 1 (Mar. 2009), Introductory Guide 1- What is the Premerger Notification Program? An Overview (ftc.gov) (last visited Feb. 7, 2022).
[18] FTC, *supra* note 16.
[19] FTC PNO, *supra* note 17 at 2-3.
[20] Bruning Law Group, *State Attorneys General and Their Influence on Merger Enforcement*, State Attorneys General and Their Influence on Merger Enforcement - Bruning Law Group (last visited Feb. 7, 2022).

The HSRA contains confidentiality provisions[21] that prohibit the federal agencies from sharing information gathered pursuant to the HSR Act with State AGs absent the consent of the merging parties. According to industry practitioners, in order to avoid the burden of having to comply with multiple demands for information, the parties generally provide such consent. Upon receiving consent from the merging parties, the federal agencies are permitted to provide State AGs with copies of any issued civil investigative demands or second requests.[22]

The OAG has expressed that receiving notices of these transactions prior to their consummation will enable the OAG to stop anticompetitive transactions and preserve competition.[23]

Effect of the Bill

The bill requires any entity conducting business in the state to provide notice to the OAG that it has submitted an HSRA filing at the same time the HSRA filing is filed with the federal government.

B. SECTION DIRECTORY:

Section 1: Provides filing requirements for certain large entities participating in a merger or acquisition.
Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Receiving an increased amount of HSRA filings may insignificantly increase OAG workload.[24] However, any fiscal impacts associated with workload increases can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

[21] 15 U.S.C. § 18A(h).
[22] Bruning Law Group, *supra* note 20.
[23] Office of the Attorney General, Agency Analysis of 2022 House Bill 705, Jan. 25, 2022.
[24] *Id*.

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES