COMMITTEE ON CORPORATION LAW

OF THE SECTION OF BUSINESS LAW

OF THE MARYLAND STATE BAR ASSOCIATION

HOUSE BILL 776: TESTIMONY IN OPPOSITION

The Committee on Corporate Law of the Section of Business Law of the Maryland State Bar Association opposes House Bill 776 which would add onerous and impractical pre-closing notification requirements for mergers, acquisitions of stock, and transfers and acquisitions of assets. We request an "UNFAVORABLE" report.

Over many decades, the United States Congress, the U.S. Federal Trade Commission, and the Antitrust Division of the Department of Justice have been at the epicenter of the nation's antitrust efforts and domestic enforcement. House Bill 776 would impose requirements that are tougher and more broad than the Federal requirements and that would be unlike any antitrust regulations found in any State. Maryland, by imposing its rules upon not only on Maryland corporations, LLCs, and residents, but also on any entity or person that "is subject to the jurisdiction of a court of this State," would impose itself as a regulator of national transactions.

House Bill 776 would make the State of Maryland a pariah within the national and international business community, delay legions of commercial and personal transactions, cause corporations, limited liability companies, trusts, employers, and businesses to consider leaving the State, and prove entirely unworkable. House Bill 776 is anti-business and poorly conceived. With its *de minimis* thresholds and limited exceptions, House Bill 776 would delay and impede not only the unspecified transactions that are the presumptive target of this Bill, but also tens of thousands of stock investments, real estate purchases, mergers, acquisitions, estate planning transfers, and a host of other commercial activities in an unpredictable and destructive fashion.

Background on Pre-Transaction Notification Requirements

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, which amended the Clayton Act and is codified in Section 7A, requires very large companies to file pre-transaction notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain acquisitions. The Act also established waiting periods that must elapse before such acquisitions may be consummated and authorized each

enforcement agency to stay those periods until the companies provide certain additional information about the likelihood that a proposed transaction would substantially lessen competition in violation of Section 7 of the Clayton Act. The notification obligations under the Act principally apply to the following types of transactions: acquisitions of voting securities, acquisitions of assets, acquisitions of control of a non-corporate entity (partnerships and limited liability companies), and mergers of corporate and non-corporate entities. Notably, the pre-transaction notification requirements are subject to numerous statutory and regulatory exceptions.

As a general rule, under the Federal regime, a transaction is subject to pre-closing notification and filing requirements only if three jurisdictional tests are met:

- Commerce test. The commerce test is met if the acquiring or the acquired entity is engaged in commerce in the U.S. or in any activity affecting U.S. commerce.

- "Size-of-transaction" test. The "size-of-transaction" test measures the value of the assets, voting securities, and non-corporate interests (membership interests or units) the acquiring entity will hold as a result of the acquisition. In 2023, the threshold for the size-of-transaction test is $111.4 million.

- "Size-of-person" test. If the size of transaction test results in an amount below $445.5 million (in 2023), the "size-of-person" test must also be satisfied. This test is met if one entity involved in the transaction has worldwide total assets or annual net sales of at least $222.7 million and the other entity has worldwide total assets or annual net sales of at least $22.3 million (in both cases as of 2023).

Where a pre-merger notification is required based upon the foregoing jurisdictional tests under the Federal rules for these very large transactions, the parties are required to submit separate filings to both the Antitrust Division of the Department of Justice and the Federal Trade Commission and wait for a thirty-day period to allow these agencies sufficient time to review the effects of the transactions on competition. These voluminous filings include, among other things, the following disclosures:

- an executed copy of the purchase agreement or letter of intent evidencing the transactions
- the most recent financial statements of the filing entities
- revenue information by North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) codes of activities conducted within the US and of foreign manufacturing operations if products are sold in or into the US
- a list of controlled subsidiaries and their locations
- a list of holders that own 5% or more but less than 50% of the outstanding voting stock or non-corporate interests of the acquired entity and the acquiring entity
- a list of minority stock and non-corporate interest holdings of more than 5% but less than 50% in certain other entities

- documents created for the sale of the target company that contain competition-related content or that discuss synergies or efficiencies

Parties are motivated to submit complete information with their initial filings because, if the Federal Trade Commission or Antitrust Division request additional information from the parties, a transaction may be delayed beyond the initial thirty-day waiting period.

This Federal pre-transaction notification and delay process currently is the only "disclosure" and "automatic delay" process imposed on transactions in the United States and is limited to very large transactions. At present, outside of limited pre-merger notifications related to specified healthcare acquisitions and consolidations in the States of Washington and Connecticut, no state in the Unites States requires state-level pre-merger notification.

Impact of Maryland House Bill 776

House Bill 776 proposes to expand pre-transaction notification requirements radically and to ensnare and delay tens of thousands of transactions per annum. If enacted, House Bill 776 would require that any person or entity "acquiring, either directly or indirectly, any voting securities or assets of another person" to file a notification with the Attorney General if "as a result of the acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of <u>$8,000,000</u>." Worse, this notification would need to be filed <u>sixty days</u> before the closing of the transaction – DOUBLE the waiting period imposed by the Federal act.

If passed, this House Bill would impose unrealistic requirements on Maryland businesses, non-Maryland businesses operating in Maryland, and Maryland residents. The new requirements would radically alter and delay existing commercial timelines observed by parties negotiating transactions. Under the Federal act, once filings are submitted, there is an initial 30-day waiting period during which the parties can neither close nor take steps to implement control over the other company's business. The waiting period is 15 calendar days for cash tender offers and acquisitions of assets out of Chapter 11 proceedings. Maryland House Bill 776, on the other hand, would require notification to be made 60 days prior to closing the acquisition, including for transactions that are also reportable under Federal law. Stated otherwise, for acquisitions subject to the Federal act, a transaction may be able to close after 30 days under the Federal act, but would need to wait 60 days for review by the State of Maryland.

House Bill 776 would impact the following:

- T. Rowe Price or another mutual fund (many of which are Maryland corporations, even if not headquartered here) buying more $8,000,000 of securities in a public company, which likely happens daily, in a rapidly moving stock market.
- A large family farm being gifted to one's family.
- A venture capital investment in a Maryland-based biotech start-up.
- A Maryland-based venture capital firm investing in a non-Maryland company.

- The sale of many businesses, including, as examples, as recently reported in the press, the sale of a Baltimore-based beer distributorship, an investment in a Maryland-based sports tournament business, and the sale of office buildings and office parks.

Sales of companies and properties, and investments in companies, are fast-paced, often with closings occurring upon the conclusion of negotiations in "sign and close" settlements. Many investors, buyers, and sellers do not have the tolerance for or luxury of coming to terms and then waiting sixty days.

The new pre-transaction notification requirements would apply to companies and Maryland residents too small to be able to engage in any conduct prohibited under Section 11-204 of the Maryland Antitrust Act and to companies and Maryland residents whose activities are exempted under the State's Act. The net cast by HB 776 would pull in companies and Maryland residents over which the Office of the Attorney General would not likely ever take any enforcement action.

HB 776 would subject Maryland businesses and other transaction participants to fluctuations in the macro economy, shifting interest rates, inflation, expanded risk allocation considerations, and extended interim operating covenants in an entirely new and unpredictable manner. This Bill would discourage investment in Maryland.

Conclusion

House Bill 776 is anti-business and poorly conceived. We request that the Committee deliver an unfavorable recommendation.

Submitted by the MSBA Committee on Corporation Law

William E. Carlson, Chair
Scott R. Wilson, Vice Chair
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