

Department of Legislative Services
 Maryland General Assembly
 2023 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 657

(The President)(By Request - Office of the Attorney General)

Judicial Proceedings

Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies

This bill establishes a premerger notification requirement that must be filed with the Office of the Attorney General (OAG) by a person acquiring a certain aggregate amount of voting securities and assets, as specified. The bill specifies classes of transactions that are exempt from the premerger notification requirement and specifies that in statutory provisions related to equitable remedies for violation of the State’s antitrust laws, “restitution” includes disgorgement.

Fiscal Summary

State Effect: General fund expenditures increase by *at least* \$206,300 in FY 2024 for staff, as discussed below. Future years expenditures reflect annualization and inflation. Revenues are not affected.

(in dollars)	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	206,300	250,300	261,400	272,900	287,200
Net Effect	(\$206,300)	(\$250,300)	(\$261,400)	(\$272,900)	(\$287,200)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Premerger Notification Requirement

A person acquiring, either directly or indirectly, any voting securities or assets of another person must file a notification with OAG if (1) 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 \$8 million and (2) the acquiring or acquired person is subject to the jurisdiction of a court of the State. In fiscal 2025 and each fiscal year thereafter, the aggregate total amount of the voting securities and assets that subjects a person to these requirements must be adjusted and published to reflect the percentage change in the gross national product for the fiscal year.

The notification filed with OAG must be filed no later than 60 calendar days before the closing of the acquisition and identify (1) all parties to the acquisition; (2) the assets being transferred in the acquisition; and (3) the anticipated closing date of the acquisition. If a person is required to file a notification with the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC), as required under federal law, the person may comply with the notice requirements under the bill by filing with OAG the same materials the person files with DOJ and FTC.

Information or documentary material filed with OAG as required under the bill (1) is not subject to the Maryland Public Information Act and (2) may be disclosed if it is found to be relevant to an administrative or judicial action or proceeding.

Exemptions from the Notice Requirements

The bill exempts the following classes of transactions:

- acquisitions of goods or realty transferred in the ordinary course of business;
- acquisitions of bonds, mortgages, deeds of trust, or other obligations that are not voting securities;
- transfers to or from a federal or State agency or a political subdivision;
- transactions specifically exempted from the premerger notice requirements; and
- other acquisitions, transfers, or transactions that are exempted by OAG (as authorized in the bill), which involve classes of persons, acquisitions, transfers, or transactions that are not likely to violate the provisions of the bill.

OAG may define any terms under the bill and adopt implementing regulations.

Civil Remedy for Violation of the Maryland Antitrust Act – Disgorgement

The bill specifies that disgorgement is a type of restitution available as one of the equitable powers a court may exercise against a defendant to remove the effects of any violation of the State's antitrust laws or prevent continuation or renewal of the violation in the future.

Current Law:

Maryland Antitrust Act

The Maryland Antitrust Act is designed to promote fair and honest competition, free of conspiracies, combinations, or agreements which unreasonably restrain trade or commerce. The State's antitrust laws are complementary to the federal Sherman Antitrust Act, contained in 15 U.S.C. §§ 1, *et seq.* The General Assembly has expressed its intent that, in construing the Maryland Antitrust Act, the courts be guided by the interpretation given by the federal courts to the federal statutes dealing with the same or similar matters.

Under the State's antitrust laws, a person is prohibited from unreasonably restraining trade or commerce by contract, combination, or conspiracy. State law specifically prohibits a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service. A restraint of trade or commerce is interference with the ordinary, usual, and free competitive pricing or distribution of goods or services in an open market. Furthermore, a restraint of trade is unreasonable if it tends to restrict production, raises prices, or otherwise control the market to the detriment of sellers, purchasers, or consumers of goods or services.

The Antitrust Division within OAG is responsible for enforcing the State's antitrust laws and investigating possible violations, as specified.

Civil Actions under the Maryland Antitrust Act

In a civil action proceeding, the court must determine whether a violation has been committed and enter any judgment or decree necessary to (1) remove the effects of any violation and (2) prevent continuation or renewal of the violation in the future. In addition to equitable remedies or other authorized relief, the court may assess a civil penalty of up to \$10,000 for each violation; each day of a violation is considered as a separate violation. Restitution is an equitable remedy that the court may exercise to restore to any person any money or real or personal property acquired from that person by means of any violation of the State's antitrust laws, as statutorily specified.

Disgorgement as an Equitable Remedy

Disgorgement is an equitable remedy, which requires a person who profits from illegal or wrongful acts to give up any profits made as a result of the illegal or wrongful conduct. The purpose of disgorgement as an equitable remedy is to prevent the defendant’s unjust enrichment by recapturing the gains the defendant secured in a transaction. Maryland law recognizes the general principle of the disgorgement remedy in restitution, where a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain. See, *Consumer Protection v. Consumer Pub.*, 304 Md. 731, 501 A.2d 48 (1985).

Background: According to the Antitrust Division of OAG, in order to address possibly anti-competitive mergers or acquisitions before they become problematic, OAG must first be aware of them. Currently, there is no systematic mechanism where firms that plan to merge provide any information about the transaction to the Maryland antitrust authorities. If a transaction is above \$111 million, the federal agencies will review the transaction, however, below that threshold, the transaction evades antitrust scrutiny.

State Expenditures: General fund expenditures increase by at least \$206,303 in fiscal 2024, which reflects the bill’s October 1, 2023 effective date. This estimate reflects the cost of hiring one Assistant Attorney General to evaluate, review, and investigate proposed mergers or acquisitions under the bill (including handling potential litigation and settlement consent decrees) and one paralegal to provide additional administrative, investigative, and litigation support. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2.0
Salaries and Fringe Benefits	\$191,485
Operating Expenses	<u>14,818</u>
Minimum FY 2024 State Expenditures	\$206,303

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. This estimate reflects staffing costs only and does not include anticipated costs to hire experts to further assist with complex merger investigations and potential litigation.

Small Business Effect: To the extent that OAG prevents anticompetitive mergers and acquisitions of large businesses, small businesses may experience a more fair and competitive marketplace.

Additional Comments: The State Department of Assessments and Taxation (SDAT) advises that although it is the entity charged with reviewing or approving Articles of

Merger pursuant to the Corporations and Associations Article, the bill does not require SDAT to request information from OAG prior to doing so.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 776 (The Speaker)(By Request - Office of the Attorney General) - Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); State Department of Assessments and Taxation; Department of Legislative Services

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