Anthony Brown, Maryland Attorney General
Uploaded by: Anthony Brown
Position: FAV

ANTHONY G. BROWN, MARYLAND ATTORNEY GENERAL

Maryland Antitrust Act-Premerger Notification Requirement and Remedies (Senate Bill 657/House Bill 776)

- SB 657/HB 776 would require parties to mergers and acquisitions valued at above $8M to notify the OAG 60 days *before consummating* the transaction.

- SB 657/HB 776 is analogous to the federal Hart-Scott-Rodino Act which provides an opportunity for the federal antitrust agencies to review large mergers and acquisitions—currently those just over $111 million—to ensure they are not anticompetitive.

- SB 657/HB 776 would provide the Attorney General an opportunity to review and challenge if appropriate, proposed mergers and acquisitions that have the potential to impact Marylanders but fall below the federal merger review threshold.

- Challenging an anticompetitive merger or acquisition *after consummation* is very expensive and difficult–and "unscrambling the eggs" can be extremely challenging—this bill alleviates these difficulties and expenses by providing the Attorney General notice of planned mergers and acquisitions *before consummation*.

- Without premerger notification, the State antitrust authority is unaware that potentially anticompetitive mergers or acquisitions are being undertaken.

- In the last few years there have been a number of mergers or acquisitions in Maryland, in areas like energy, medical cannabis, pharmaceuticals and technology that have fallen below the federal threshold and have escaped review.

- We need to look at these mergers before they happen, to evaluate the impact on competition in their respective markets in Maryland.

- To initiate review after a merger is closed presents significant complexities that would be avoided if we had notice in advance.

- SB 657/HB 776 would also clarify that the remedy of restitution delineated in the Maryland Antitrust Act includes disgorgement.

SB657.LOS.pdf
Uploaded by: Heather Forsyth
Position: FAV

ANTHONY G. BROWN
Attorney General

CANDACE MCLAREN LANHAM
Chief of Staff

CAROLYN QUATTROCKI
Deputy Attorney General

WILLIAM D. GRUHN
Chief
Consumer Protection Division

Writer's Fax No.
410.576.6571

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

Writer's Direct Dial No.
410.576.6513

February 21, 2023

TO: The Honorable Will Smith Jr.
Chair, Judicial Proceedings Committee

FROM: Office of the Attorney General, Health Education and Advocacy Unit

RE: SB0657 - Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies

The Health Education and Advocacy Unit of the Office of the Attorney General supports SB0657, which adds a premerger notification requirement to the Commercial Law Article, Title 11, Subtitle 2, Antitrust. The purpose of the subtitle is to complement the body of federal law governing restraints of trade, unfair competition, and unfair or deceptive practices.

Under the current law, the Attorney General in civil proceedings may request oral or written testimony or the production of documents relevant to the investigation of a possible antitrust violation. The premerger notification for mergers over $8 million dollars would give the Antitrust Division of the Attorney General's Office the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated and injury to consumers can occur. This would add an additional tool to bolster our Antitrust Division's efforts to preserve competition in health care and protect patients from higher costs. *See*, https://www.americanprogress.org/article/empowering-state-attorneys-general-to-fight-health-care-consolidation/.

Premerger notification is already required under federal law for mergers over $111.4 million dollars under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435. In a joint report produced by the Federal Trade Commission and the Antitrust Division of the Department of Justice, the agencies noted that 3,520 transactions

were reported in FY21, resulting in 32 challenges to protect competition across the economy, including in consumer goods, pharmaceuticals, and healthcare.

Competition in the healthcare industry benefits consumers because it helps contain costs, improve quality, expand choice, and encourage innovation. Mergers between two systems, two hospitals, a hospital and a doctor group practice, between a doctor group practice and medical support services (labs, imaging centers, pharmacies, equipment), threaten the benefits of healthy competition. *See*, https://www.statnews.com/2021/09/02/hospital-mergers-more-oversight-federal-state-officials/ and https://www.ahip.org/news/articles/how-hospital-consolidation-hurts-americans.

Other attempts at healthcare market consolidation and cross-market integration of hospitals, providers, and insurers is increasing and contributing to rising health care costs. Brent Fulton, "Health Care Market Concentration Trends in the United States: Evidence and Policy Responses" (Washington, D.C.: Health Affairs, 2017), available at https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0556.

The DOJ's recent rollback of three policies that created safe harbors from antitrust enforcement in the healthcare industry highlights the DOJ and FTC's intent to reshape antitrust enforcement in the health care sector. At an April 2022 "listening forum" on health care mergers, for instance, the FTC Chair said that "[t]he types of potential consolidation and monopoly problems that we may be seeing in health care aren't just isolated to one corner of the industry … it's really across the board and systematic in a way that we really need to be vigilant …." https://www.ftc.gov/news-events/events/2022/04/ftc-justice-department-listening-forum-firsthand-effects-mergers-acquisitions-health-care.

The bill also adds language to § 11-210 to clarify that restitution includes disgorgement for purposes of the subsection. The Consumer Protection Division supports making clear for antitrust purposes what is well-established law under the Consumer Protection Act, that disgorgement is encompassed within restitution under Maryland law. *E.g.*, *Consumer Prot. Div. v. Consumer Publ'g Co.*, 304 Md. 731, 776 (1985).

Marylanders deserve to have its regulators scrutinize consolidation that would adversely impact their quality and cost of care. Maryland patients would benefit from this premerger notification reporting requirement. We respectfully request a favorable report on SB0657.

2023-02-22 SB 657 (Support with Amendments)) final

Uploaded by: schonette walker

Position: FWA

ANTHONY G. BROWN
Attorney General

CANDACE MCCLAREN LANHAM
Chief of Staff

CAROLYN QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
ANTITRUST DIVISION

SCHONETTE J. WALKER
Chief
Antitrust Division

GARY HONICK
Deputy Chief
Antitrust Division

(410) 576-6470

WRITER'S DIRECT DIAL NO. 410-576-6473

February 22, 2023

TO: The Honorable William C. Smith Jr.
Chair, Judicial Proceedings Committee

FROM: Schonette J. Walker
Chief, Antitrust Division, Office of the Attorney General

RE: SB 0657 – Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies (**Support with Sponsor Amendments**)

The Office of the Attorney General's Antitrust Division supports Senate Bill 657, but offers two perfecting Sponsor amendments. This Bill would require parties to notify the Office of the Attorney General – which is the State agency that enforces the antitrust laws—before consummating a merger or acquisition valued above $8 million. In addition, the Bill would clarify that the remedy of restitution as delineated in the Maryland Antitrust Act includes disgorgement.

Economic markets work best to provide the widest array of goods and services at the best prices when there are many buyers and many sellers. Concentrated, or uncompetitive markets where there are too few sellers or too few buyers in competition with each other can bring about significant consumer harm. A market with too few sellers may lead to the exertion of monopoly power, which could lead to higher prices for goods and services, lower output and compromised quality. On the flip side, a market with too few buyers can be just as harmful. Think, for example, of power buyers who can pay suppliers less than competitive prices for goods or

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us.

services or large employers or groups of employers who, by their size and breadth, can exert monopsony power and dictate less than competitive wages for sectors of the economy. The antitrust laws that focus on mergers and acquisitions seek to address these potential issues in their incipiency, before they become full blown problems.

In order for Maryland's antitrust enforcer to address possibly anti-competitive mergers or acquisitions before they become problematic, the enforcer must first be aware of them. Currently that is not the case. 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 deal. Below that threshold, the transaction evades antitrust scrutiny. This is currently a gap in antitrust enforcement that should be filled at the state level.

This matters because unchecked consolidation can harm Marylanders. For example, a Johns Hopkins University study showed that because of consolidation, 81 percent of Baltimore's local deposits were held by just 6 of the area's largest banks; from 2007-2016 lending to small businesses by these banks had fallen by nearly one third.[1]

Maryland consumers and Maryland businesses deserve better. Senate Bill 657 seeks to fill in the gap between large mergers that are subject to federal antitrust scrutiny and smaller deals that, without state review, would fall through the cracks. The Bill is not burdensome. It merely seeks to have parties who are involved in proposed mergers or acquisitions valued above $8 million, inform the Attorney General's Office sixty (60) days before closing the deal. The Bill only requires information about the assets being transferred and the anticipated closing date. This pre-merger notification will give Attorney General staff with antitrust expertise the opportunity to review potential tie-ups for antitrust concerns before they are completed. Although mergers can be reviewed and even challenged after the fact, it is often nearly impossible to "unscramble the eggs" and restore competition where it has been reduced by a merger. The Bill also gives the business community confidence that their transactions do not raise antitrust concerns and that they are not entering into potentially anticompetitive transactions in violation of the Maryland Antitrust Act.

Support of this legislation is in line with the goals and principles of the Attorney General's Office to promote competition and the fair operation of markets, which will benefit all

[1] Tim Curtis, *Report: Small business lending in Baltimore down*, Johns Hopkins 21 Century Cities Initiative, Aug. 1, 2018, available online at https://21cc.jhu.edu/report-small-business-lending-in-baltimore-down/ (last visited Feb. 20, 2023).

200 Saint Paul Place ❖ Baltimore, Maryland 21202-2021
Telephone (410) 576-6300 ❖ D.C. Metro (301) 470-7534
Telephone for Deaf (410) 576-6372

Marylanders. I respectfully request the Judicial Proceedings Committee adopt the below amendments and favorably report SB 657.

Amendment No. 1: On page 1, line 4, strike "who has acquired" and insert "WHO PLANS TO ACQUIRE" in its stead;

Amendment No. 2: On page 2, line 19, strike "(D)" and insert "(E)" in its stead.

cc: Committee Members

MBIA Letter of Opposition SB 657.pdf
Uploaded by: Lori Graf
Position: UNF

MARYLAND BUILDING INDUSTRY ASSOCIATION
11825 West Market Place | Fulton, MD 20759 | 301-776-6242

February 20, 2023

The Honorable William C. Smith Jr.
Senate Judicial Proceedings Committee
Miller Senate Office Building,
2 East Wing 11 Bladen St.,
Annapolis, MD, 21401

RE: Opposition of SB 0657 Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies

Dear Chairman Smith:

The Maryland Building Industry Association, representing 100,000 employees statewide, appreciates the opportunity to participate in the discussion surrounding **SB 0657 Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies**. MBIA **opposes** the Act in its current version.

This bill requires a person who has acquired certain voting securities or assets of another person to file a certain notice with the Attorney General under certain circumstances. MBIA respectfully opposes this measure, as there are comprehensive Federal antitrust laws already in place, and having the State Attorney General approve the real estate transactions on top of that will only cause needless delays in these transactions. We believe that the $8,000,000 threshold for reporting transactions is extremely low in comparison to the $100,000,000 minimum required under Federal law, and the 60-day notice may not always be possible.. The provisions in this bill restrain real estate business in the State of Maryland and they add an unnecessary burden in a time of economic hardship.

For these reasons, MBIA respectfully requests the Committee give this measure an **unfavorable** report. Thank you for your consideration.

For more information about this position, please contact Lori Graf at 410-800-7327 or lgraf@marylandbuilders.org.

cc: Members of the Senate Judicial Proceedings Committee

AG Notice Oppose.pdf
Uploaded by: Sarah Kahl
Position: UNF

MSBA
MARYLAND STATE
BAR ASSOCIATION

MSBA Main Office
520 West Fayette Street
Baltimore, MD 21201
410-685-7878 | msba.org

Annapolis Office
200 Duke of Gloucester Street
Annapolis, MD 21401
410-269-6464 | msba.org

To: Maryland Senate – Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: February 21, 2023

Subject: SB 657– Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies

Position: Oppose

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **opposes Senate Bill 657 – Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies**

Description of SB 657

Senate Bill 657 would require notice to the Attorney General sixty days prior to any person's acquisition of voting stock or assets of another person greater than $8 million, with certain limited exceptions.

Application of SB 657 to Estate Planning Transactions

SB 657 casts a wide net, and in doing so, appears to capture transactions done for estate planning as well as transfers at death, even though such transactions do not appear to be of interest to the Attorney General.

With limited exceptions, SB 657 covers "any person acquiring, directly or indirectly, any voting securities or assets, 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 $8,000,000."

In the Commercial Law Article, "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental

MSBA
MARYLAND STATE
BAR ASSOCIATION

MSBA Main Office
520 West Fayette Street
Baltimore, MD 21201
410-685-7878 | msba.org

Annapolis Office
200 Duke of Gloucester Street
Annapolis, MD 21401
410-269-6464 | msba.org

subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity. Thus, individuals, trusts and estates are specifically included in the concept of a Person.

A gift by a parent to a child of voting stock of a family business, if the value exceeded $8 million, would seem to require notification to the Attorney General. Although describing the parent as "acquired person" does not seem to fit, "acquired person" is not defined, and, therefore, we are left to assume that each party to a transfer of assets is either an acquiring person or an acquired person.

Indeed, even an individual receiving a gift or bequest of $8.1 million in cash from parent would be a Person acquiring assets in excess of $8 million of another Person.

The exceptions provided are so narrowly drawn, that even gifts and bequests to charity appear to be captured. As written, a charity could also be a Person acquiring property of another Person.

An exception for gifts and bequests, if added to the bill, would be insufficient to exclude many family transactions, as consideration is often part of the transaction. Sometimes, a child, or a trust for a child, will purchase stock in the family business in exchange for a promissory note with favorable terms, for example.

It would also not be unusual for a client to transfer property to a limited liability company with the same ownership structure as the initial company for estate planning reasons. This would do little to change the ownership of assets, but this, too, does not fall within any exception.

SB 657 gives the Attorney General latitude to offer additional exceptions, but given the large number of transactions that would have to be excepted in order to allow estate planning transactions to occur without notice, we cannot assume that sufficient exceptions will be made.

To allow Maryland residents the freedom to complete estate planning transactions without notifying the Attorney General, the Estate and Trust Law Section of the MSBA **opposes SB 657 and urges an unfavorable committee report.**

MSBA
MARYLAND STATE
BAR ASSOCIATION

MSBA Main Office
520 West Fayette Street
Baltimore, MD 21201
410-685-7878 | msba.org

Annapolis Office
200 Duke of Gloucester Street
Annapolis, MD 21401
410-269-6464 | msba.org

For further information, please contact:

Christine W. Hubbard
(410) 798-4533
christine@chubbardlaw.com

Sarah B. Kahl
(410) 244-7584
sbkahl@venable.com

Christia Pritts
(410)828-7775
cpritts@simscampbell.law

wec.019721.99999.122.v02. SB657-UNF -- MSBA - Comm

Uploaded by: Scott Wilson

Position: UNF

COMMITTEE ON CORPORATION LAW

OF THE SECTION OF BUSINESS LAW

OF THE MARYLAND STATE BAR ASSOCIATION

SENATE BILL 657: TESTIMONY IN OPPOSITION

The Committee on Corporate Law of the Section of Business Law of the Maryland State Bar Association opposes Senate Bill 657 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. Senate Bill 657 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.

Senate Bill 657 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. Senate Bill 657 is anti-business and poorly conceived. With its *de minimis* thresholds and limited exceptions, Senate Bill 657 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 Senate Bill 657

Senate Bill 657 proposes to expand pre-transaction notification requirements radically and to ensnare and delay tens of thousands of transactions per annum. If enacted, Senate Bill 657 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 $8,000,000." Worse, this notification would need to be filed sixty days before the closing of the transaction – DOUBLE the waiting period imposed by the Federal act.

If passed, this Senate 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 Senate Bill 657, 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.

Senate Bill 657 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.

- 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. SB 657 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

Senate Bill 657 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
February 22, 2023

02.21.2023 Ag Law Section Council Opposition to SB

Uploaded by: Stephanie Brophy

Position: UNF

Stephanie R. Brophy
Dulany Leahy Curtis & Brophy LLP
182 East Main Street
Westminster, Maryland 21157-5012
(410) 848-3333
brophy@dulany.com

SENATE BILL 657 - UNFAVORABLE

February 21, 2023

Written testimony submitted via Maryland General Assembly Website

The Honorable William C. Smith, Jr., Chair
Senate Judicial Proceedings Committee
2 East
Miller Senate Office Building
Annapolis, Maryland 21401

Re: MSBA Agricultural Law Section Opposition to Senate Bill 657

Dear Senator Smith:

The membership of the Agricultural Law Section of the Maryland State Bar Association is comprised of Maryland attorneys, both in private practice and in government, who represent a wide range of individuals, entities and government agencies involved in Maryland agriculture.[1] The Section's governing Council reviewed Senate Bill 657 (the "Bill") and voted to submit written testimony opposing the Bill.

Senate Bill 657 provides that every person or entity subject to the jurisdiction of the State of Maryland that acquires, directly or indirectly, voting securities or assets of another person or entity outside of the ordinary course of business with a value of more than $8,000,000.00 would be required to a file notice of the transaction with supporting documentation with the Maryland Attorney General at least 60 days prior to closing. This means every acquisition of a business and every real estate transaction of more $8,000,000.00 would be subject to the state-level pre-transaction notification and delay process. The Bill would modify sections 11-205 through 11-213 of the Commercial Law Article of the Maryland Code.

Section 11-202 of the Commercial Law Article, not proposed to be modified by the Bill, governs the purpose, interpretation, and construction of the Antitrust subtitle and provides in pertinent part:

[1] All Section member-attorneys representing Maryland agencies have abstained from the vote to oppose SB 657 and from participating in the drafting of this opposition testimony.

(a)
(1) **The General Assembly of Maryland declares that the purpose of this subtitle is to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest intrastate competition**.
[…].

(3) It is also the intent of the General Assembly that, in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition within the State, determination of the relevant market or effective area of competition may not be limited by the boundaries of the State.

[…].

§11-202, Commercial Law Article, Maryland Code (emphasis added).

Pursuant to §11-202 of Maryland's Commercial Law Article, the antitrust statutory framework is meant to complement the body of federal law governing restraints of trade and unfair competition, not usurp it. The Bill purports to be an antitrust bill, yet does not indicate or even imply what antitrust issue the Bill is attempting to protect against. It is also unclear what the $8,000,000.00 threshold is tied to. The federal antitrust statute, by way of example, has a 2023 size of transaction dollar threshold of $111,400,000.00. Even if that threshold is met, another test, the size of person test, must also be satisfied if the size of the transaction is less than $445,500,000. 00.

It is clear, however, that if implemented this Bill would impose unnecessary burden and delay on individuals and businesses, both inside and outside the State of Maryland, because as written the net cast by this Bill is wide, applying to transactions both in and outside of Maryland if either party to the transaction is subject to the jurisdiction of Maryland and at a relatively low size of transaction test level of $8,000,000.00. In addition to imposing unnecessary delay and burden on individuals and businesses involved in transactions where there is no threat of unfair trade or unfair competition, if enacted this Bill makes the State of Maryland far less attractive to businesses and individuals, regardless of where they reside, because the Bill would put unnecessary restraints on alienation and may very well be an unlawful impediment to interstate commerce.

Agriculture is Maryland's number one industry and is made up of 12,400 farms and nearly 21,300 diverse producers. See 2021-2022, Agricultural Statistics Annual Bulletin at https://www.nass.usda.gov/Statistics_by_State/Maryland/Publications/Annual_Statistical_Bulletin/2021/2021_2022_MD_Annual_Bulletin_Final.pdf. The agribusiness industry in Maryland spans the spectrum from large industry leaders such as the world's leading spice maker McCormick and Company to family farms, microbreweries, vertical growth farms and aquaculture businesses. Agriculture is the largest commercial industry in Maryland, employing approximately 350,000 people, including nearly 6,000 full-time farmers, and contributing approximately $8.25 billion annually to the economy. Agriculture is also the largest single land use in the State of Maryland, with 2 million acres, or approximately 32% of total land area used for farming in 2021. https://msa.maryland.gov/msa/mdmanual/01glance/html/agri.html#:~:text=Agriculture%20is%20the%20largest%20commercial,billion%20annually%20to%20the%20economy.

As applied to individuals and entities involved in agriculture in Maryland, every sale of a farm or agricultural business with a value greater than $8,000,000.00 would be subject to the 60 days advance notice filing requirement. Often these transactions close within 30 days and often these transactions are tied to the timing of crop planting or harvest, both of which are time sensitive endeavors. Every equity investment in an agricultural business greater than $8,000,000.00 would be subject to the 60 days advance notice filing requirement with the Maryland Attorney General. And, again, the Bill does not specify what antitrust concern is being protected against here.

With the ever-increasing cost of land in Maryland, the breadth of this legislation reaches into the interfamily transfers in the agriculture community, as well as estate planning, gifting and inheritances. There simply is no rational basis for requiring parents or grandparents to advise the Attorney General before creating an intervivos trust for estate planning purposes. Again, there is no articulation of how this legislation serves to combat a legitimate antitrust concern.

In addition to the aforementioned reasons, we oppose the Bill because Section 11-205 (A)(5) of the Bill provides that pursuant to subsection (D)[2] of the Bill, the Attorney General may exempt other transactions, transfers or transactions. The idea that there is going to be an ad hoc framework that will affect so many individuals and businesses is not good legislation. It is an illegitimate delegation of discretion. The Bill allows the Attorney General to expand the exemptions provided under the legislation to exclude those "that are not likely to violate the provisions of this section" but provides no guidance on how to determine which transactions may not be "likely to violate" the law. Regulatory discretion such as this properly lies with the Executive Branch, which employs experts to advise on such policy decisions. The Attorney General's Office has no qualifications to exercise unfettered discretion regarding commercial transactions. The Attorney General's Office has no analysts or employees with regulatory expertise in this arena, so its decisions in this regard will not be entitled to deference during judicial review when challenged.

And finally, subsection (D) of the Bill provides that information filed with the Maryland Attorney General is not subject to the Maryland Public Information Act, but then provides that it may be disclosed if it is found relevant to an administrative or judicial action or proceeding. As discussed above, the Bill casts such a wide net that many individuals, business and persons engaged in estate planning and even decedents' estates in probate would be caught in it and the idea that information not normally subject to disclosure unless obtained through the relevant legal avenues, such as a subpoena or discovery in a court action, could now be used in an administrative or judicial proceeding outside of the ordinary framework for obtaining and using such information is a recipe for damaging disclosure and endless litigation regarding the same.

For all the reasons set forth above, and many more, the Agricultural Law Section of the Maryland State Bar Association opposes Senate Bill 657.

Sincerely,
/s/ Stephanie R. Brophy

Stephanie R. Brophy
Chair, MSBA Agricultural Law Sectiion

[2] Section 11-205(A)(5) references to subsection (D) of the Bill; however, the correction citation should be to subsection (E).

SB 657 - Commercial Law - Antitrust Disclosure - N

Uploaded by: Tom Ballentine

Position: UNF

NAIOP
MARYLAND CHAPTERS
THE ASSOCIATION FOR COMMERCIAL REAL ESTATE

February 21, 2023

The Honorable William C. Smith, Jr., Chair
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East
Annapolis, MD 21401

Unfavorable: SB 657 – Commercial Law – Maryland Antitrust Act – Premerger Notification – Requirement and Remedies

Dear, Chair Smith and Committee Members:

The NAIOP Maryland Chapters representing more than 700 companies involved in all aspects of commercial, industrial, and mixed-use real estate recommend your unfavorable report on SB 657.

SB 657 would require 60-day notice to the Maryland Attorney General of any acquisition over $8 million. The bill includes references to realty, mortgages, and deed of trust in the exemptions listed in 11-205 (A) that are insufficient.

While we appreciate the effort to exempt real estate transactions, the language applying the exemption to "the ordinary course of business" does not align well with the structure of the contemporary real estate enterprise that uses single purpose entities to develop, construct and lease buildings.

The reference to "realty" is not a term of art used elsewhere in Maryland law that we are aware of.

Any confusion about the exemption for real property would expose Maryland real estate companies and their in-state or out of state partners to at least a 60-day waiting period. Real estate transactions are time sensitive and target 30-day closings. This interference would be burdensome.

For these reasons NAIOP respectfully requests your unfavorable report on SB 657.

Sincerely,

Tom Ballentine, Vice President for Policy
NAIOP Maryland Chapters - *The Association for Commercial Real Estate*

cc: Judicial Proceedings Committee Members
Nick Manis – Manis, Canning Assoc.

U.S. Mail: P.O. Box 16280, Baltimore, Maryland 21210 **Phone:** 410.977.2053 **Email:** tom.ballentine@naiop-md.org

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Uploaded by: William Carlson

Position: UNF

COMMITTEE ON CORPORATION LAW

OF THE SECTION OF BUSINESS LAW

OF THE MARYLAND STATE BAR ASSOCIATION

SENATE BILL 657: TESTIMONY IN OPPOSITION

The Committee on Corporate Law of the Section of Business Law of the Maryland State Bar Association opposes Senate Bill 657 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. Senate Bill 657 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.

Senate Bill 657 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. Senate Bill 657 is anti-business and poorly conceived. With its *de minimis* thresholds and limited exceptions, Senate Bill 657 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 Senate Bill 657

Senate Bill 657 proposes to expand pre-transaction notification requirements radically and to ensnare and delay tens of thousands of transactions per annum. If enacted, Senate Bill 657 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 $8,000,000." Worse, this notification would need to be filed sixty days before the closing of the transaction – DOUBLE the waiting period imposed by the Federal act.

If passed, this Senate 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 Senate Bill 657, 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.

Senate Bill 657 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.

- 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. SB 657 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

Senate Bill 657 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
February 22, 2023

2023 SB 657 [2.21.23].pdf
Uploaded by: William O'Connell
Position: UNF

Real Property Section

To: Judicial Proceedings Committee (Senate)

From: Legislative Committee of the Real Property Section Counsel

Date: February 21, 2023 [Hearing Date February 22, 2023]

Subject: **SB 657 – Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies**

Position: **Opposed**

The Real Property Section Counsel of the Maryland State Bar Association (MSBA) **opposes Senate Bill 657 – Commercial Law – Maryland Antitrust Act – Premerger Notification Requirement and Remedies.**

The bill seeks to require persons to file a notice with the Attorney General when acquiring voting securities and assets in excess of $8,000,000 unless the transaction is exempt. Under the bill . . .

> . . . THE FOLLOWING CLASSES OF TRANSACTIONS ARE EXEMPT FROM THE REQUIREMENTS OF THIS SECTION:
>
> (1) ACQUISITIONS OF GOODS OR REALTY TRANSFERRED IN THE ORDINARY COURSE OF BUSINESS; . . . .

But all real property transaction should be excluded. Thus, if the legislature believes this proposed law will be good for Maryland, the statute should be amended to say:

> . . . THE FOLLOWING CLASSES OF TRANSACTIONS ARE EXEMPT FROM THE REQUIREMENTS OF THIS SECTION:
>
> (1) ACQUISITIONS OF GOODS ~~OR REALTY~~ TRANSFERRED IN THE ORDINARY COURSE OF BUSINESS; . . . .
>
> (2) ACQUISITIONS OR TRANSFERS OF REAL PROPERTY:
>
> (~~2~~3) ACQUISITIONS OF BONDS, MORTGAGES, DEEDS OF TRUST, OR OTHER OBLIGATIONS THAT ARE NOT VOTING SECURITIES; . . . .

Thank you for your consideration.