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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 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 than \$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 Section

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