[7]*Id.* at 5, 24.

[8]*Id.* at 24.

[9]*Id.* at 25.

[10]*Id.* at 26-27.

[11]Effective August 1, 2016, the appraisal rights of dissenting stockholders in mergers and certain other transactions under the DGCL were modified. *See* 8 Del. § 262.

[12]*See Manti Holdings, LLC v. Authentix Acquisition Company, Inc.*, 261 A.3d 1199 (Del. 2021).

PROPOSED LEGISLATION IN NEW YORK WOULD ENACT THE FIRST GENERAL, STATE-LEVEL PREMERGER REPORTING REGIME

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Proposed legislative reforms to antitrust laws are abundant. At the federal level, several bills from both sides of the aisle are percolating through various stages of committee and debate. While the federal proposals are receiving most of the media attention, legislation at the state level could cause significant, and potentially disruptive, change in the M&A space. A series of bills moving through the New York state legislature would amend the state's antitrust laws (the Donnelly Act). Two of those bills, New York Senate Bill 933A ("S933A") and New York Assembly Bill 1812A ("A1812A") (collectively, the "Antitrust Bills"), would introduce a premerger reporting obligation at the state level similar to the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act").[1]

The Senate version of the bill passed at the end of last year's legislative session, which ended before the Assembly could take up its version of the bill. In January 2022, the bill passed through the Senate's Consumer Protection Committee, and must be passed by the Senate, passed by the Assembly, and signed by the governor before becoming law.

Although there are narrow state-level merger reporting requirements in particular industries (*e.g.*, for certain insurance or energy transactions), no U.S. state has a general merger reporting obligation like the HSR Act. Adding a state-level premerger notification requirement, on top of the HSR Act and the more than 135 international merger control regimes, is misguided for a number of reasons. First, the Antitrust Bills, if adopted, would slow closing for the large number of mergers and acquisitions that the proposed law would catch, most of which raise no conceivable antitrust concerns. Second, the likely high volume of filings would increase the already significant (and growing) regulatory burdens on transacting parties, while imposing a significant burden on New York State's resources for many transactions without competitive concerns. State-level premerger requirements also will likely duplicate the efforts of federal regulators.

Increased Regulatory Burden on Merging Parties for Non-Problematic Mergers

A key challenge for policymakers in designing a merger control regime is to catch and review potentially anticompetitive transactions while expeditiously clearing those deals that present little-to-no antitrust risk. Relatively few M&A deals pose antitrust risk. Although imperfect, premerger antitrust law is thus typically designed to allow for the quick disposition of non-problematic mergers, while providing time to investigate M&A activity

that may pose antitrust risk. Over the more than 45 years since the passage of the HSR Act, the federal antitrust authorities have balanced those priorities by indexing HSR filing thresholds to GNP growth, adopting exemptions to let low-risk transactions proceed without filing or review, and providing for early termination of the HSR waiting period for non-problematic transactions.[2] Yet even with those efforts to weed out non-problematic deals, the DOJ and FTC have received filings for more than 2,000 transactions[3] each year over the last few years—and a preliminary record 4,130 in 2021. Few of those transactions warrant significant antitrust scrutiny. On average, over the previous 10 years (2010-2020), the DOJ and FTC determined that more than 97% of transactions did not merit an extended review. Even fewer transactions necessitate a remedy (*e.g.*, a divestiture) and an even smaller number end in merger litigation.

The Antitrust Bills will require a premerger filing if both size-of-transaction and size-of-person tests are met. The Antitrust Bills base their size-of-transaction and size-of-person tests on a percentage of the thresholds under the HSR Act, which sets the New York thresholds far below the federal thresholds. In particular, the federal size-of-transaction threshold in 2022 is $101 million, and the same New York test would be just 10% of $101 million, or $10.1 million. If adopted this year, New York's $10.1 million threshold would be about the same as the threshold under the HSR Act when it was first implemented in 1978, $10 million, not even adjusted for inflation. The New York size-of-person test, which measures either the buyer's or target's annual net sales or assets within New York, is set at 2.5% of the federal threshold under 15 U.S.C.A. § 18A(A)(2)(A), or $200 million, as adjusted for inflation, $403.9 million in 2022. The value of the New York size-of-person test in 2022 therefore would be just $10.0975 million. If adopted, New York's low filing thresholds will lead to a number of filings many orders of magnitude larger than the federal threshold that led to a "tidal wave" of federal merger filings in 2021, approximately 4,130.

Unless it adds substantial resources, as detailed below, New York's Antitrust Bureau cannot possibly review even a fraction of the total number of transactions for which it likely would receive filings. By way of example, the FTC employed 1,160 full-time employees in FY2020, with a budget of $332 million. The DOJ employed 782 individuals, with a budget of more than $188.5 million, for a combined total of more than 1,900 employees with a budget of more than $520 million (not including the substantial revenue derived from HSR filings). While not all of these employees work on premerger review, the premerger review process requires agency lawyers, economists, and other staff to review the filings, analyze party data, review business documents, conduct independent research, and potentially conduct interviews of third parties, among other tasks to determine if additional investigation is required.

In contrast, the Office of the New York Attorney General ("NY AG")—in total, for all departments—had a budget of around $272 million for FY2020, while the Antitrust Bureau of NY AG employs just about 20 individuals. Asking 20 employees to review 4,000 transactions (let alone the number of filings New York could expect under the Antitrust Bills) is unrealistic, especially considering those employees have other duties outside of premerger review. As a result, it is likely that even with increased staffing, many of the filings required under the Antitrust Bills would receive a cursory review, if that, while imposing a meaningless regulatory obligation on an even larger number of transactions, the large majority of which pose no antitrust concerns.

Perhaps most significantly, the Antitrust Bills would adopt a 60-day waiting period for all reportable transactions. In other words, transactions requiring a notification would not be allowed to close until 60 days after submission of a notification in New York. Because the low size-of-transaction test would catch many more transactions than the HSR Act, a large number of non-problematic transactions that are not reportable under the HSR Act would be subject to a 60-day standstill obligation. In addition, many transactions that require an HSR filing also will require a New York filing for which the statutory waiting period is twice as long. In other words, a large number of the approximately 97% of transactions that would be able to close following expiration of the initial 30-day[4] HSR Act waiting period would have to wait an additional 30 days to close if New York adopts the Antitrust Bills. And that does not even consider that many HSR-notifiable transactions—approximately 58% over the past 10 years—had a waiting period of less than 30 days because they received early termination of the HSR waiting period.

Doubling (or more than doubling) the waiting period for non-problematic M&A is not a costless exercise. Instead consumers, customers, investors, and employees lose out on the many benefits that result from M&A such as lower costs, improved operations, introduction of new products, shared best practices, new R&D, etc. Although the costs of 30-60 days of delay from New York's Antitrust Bills in any one transaction arguably might not be significant, those costs balloon when multiplied over thousands (or tens of thousands) of transactions.

The Antitrust Bills also do not provide any detail about the type of substantive review that could occur if the NY AG determined more information is required beyond the initial filing. Instead, the proposed legislation empowers the NY AG to adopt rules to carry out the purpose of the bills. In federal merger review, parties can generally predict what types of information the federal agencies will seek if they require more information and plan ahead accordingly. This allows for the efficient channeling of relevant information to federal enforcers evaluating a transaction.

Few Exemptions, So Far

Over the last 45-plus years, the federal antitrust authorities have adopted a number of good-sense exemptions to the HSR Act that exclude obviously non-problematic transactions, such as purely financial transactions, which are not likely to affect competition. While the Antitrust Bills empower the NY AG to create exemptions, those exemptions do not exist in the Antitrust Bills in their current form. And, unlike in the HSR Act, there is no provision that would toll the notification requirement while the NY AG develops those exemptions. For reference, after Congress passed the HSR Act in 1976, it took nearly two years for the implementing regulations to take effect, and that occurred only after the agencies received hundreds of public comments on several substantial revisions of the rules.

The HSR rules feature exemptions for certain institutional and passive investors. A number of commenters have raised concerns that the Antitrust Bills could cause disruption in financial markets because, without exemptions, the proposed legislation would likely lead to reporting obligations for acquisitions by investment management companies that manage index, mutual, or exchange-traded funds. Indeed, the small size-of-person ($10.0975 million) and size-of-transaction ($10.1 million) tests means a large investment firm could be required to make a filing based on purchases of small amounts of public securities if the acquired entity has even minimal sales or assets in New York. Aside from the substantial problem that waiting 60

days to make such an acquisition presents, the fund or buyer in that case would not typically have access to information about the target's assets or sales in New York to even determine whether a filing would be required. Given the low dollar thresholds and lack of exemptions, acquirers could find themselves in the position of having to "guess" whether a filing is required.

State-Level Premerger Review Will Duplicate Federal Efforts

As noted above, the DOJ and FTC have a large staff to assess and/or review the many filings that ultimately results in a small number of transactions with significant investigations. Duplicating that work in the New York AG's office would unnecessarily waste resources, particularly in light of the close cooperation that already exists between federal and state authorities. The federal antitrust agencies and state attorneys general often work hand-in-hand, with both the DOJ and FTC having policies that strongly encourage cooperation with state authorities.[5] As a result, DOJ, FTC, and state antitrust agencies jointly investigate mergers, jointly develop investigatory requests and subpoenas, jointly interview and depose witnesses, share or allocate investigation responsibility, and jointly consider settlements. With the proper confidentiality waivers, the federal agencies also typically provide state attorneys general access to all of the documents, data, and other information produced to the DOJ and FTC. Given the close level of coordination that already exists, the benefit of the Antitrust Bills is dubious.

Key Takeaways

1. A bill is making its way through the New York legislature that, if enacted, would implement the first general state-level premerger reporting obligation similar to the HSR Act. The Antitrust Bills must still pass in the Senate and Assembly, and be signed by the governor.

2. Although New York's Antitrust Bills are silent about the type of substantive review that would happen following a notification or whether the NY AG will require parties to submit additional information following a filing, the low reporting thresholds mean that New York will receive thousands—or maybe tens of thousands—more filings than DOJ and FTC receive each year.

3. Without a massive expenditure by New York adding resources to review filings and to conduct many more investigations, those filings are likely to add regulatory burden with little-to-no benefit for antitrust enforcement.

4. If enacted as is, many thousands of transactions will be subject to a 60-day waiting period before closing that is longer than the current 30-day waiting period for most transactions that require HSR premerger notification.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]Other provisions in S993A and A1812A, in addition to another bill, New York Assembly Bill 3399 ("A3399"), would add an "abuse of dominance" prohibition to the Sherman Act's unilateral conduct provisions. This article, however, will focus on the premerger notification requirements of the Antitrust Bills.

[2]The two agencies formally suspended early termination of the HSR waiting period in February

2021. Although this was intended to be "temporary," it is still in effect and there is no indication when early termination will be restored. *See* FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination, Federal Trade Commission (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[3]U.S. Dep't Justice & Fed. Trade Comm'n, HSR Annual Report, Fiscal Year 2019, Appendix A, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[4]The waiting period for certain transactions is just 15 days. By federal statute, the waiting period is just 15 days for transactions involving cash tender offers and acquisitions pursuant to Section 363 of the Bankruptcy Code.

[5]*See e.g.*, Fed. Trade Comm'n, Protocol for Coordination in Merger Investigations, https://www.ftc.gov/tips-advice/competition-guidance/merger-investigations ("To the extent lawful, practicable and desirable in the circumstances of a particular case, the Antitrust Division or the FTC and the State Attorneys General will cooperate in analyzing the merger. This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties."); U.S. Dep't of Justice, Antitrust Division Manual, ch. VII, § C, at VII-9, 5th Ed. 2017, https://www.justice.gov/atr/file/761161/download ("The Division is committed to cooperating with state attorneys general. Effective cooperation between the Division and the states benefits the public through the efficient use of antitrust enforcement resources. Cooperation with the states gives the Division the benefit of local counsel who know the local markets well. It also promotes consistent enforcement and minimizes the burden of duplicative investigations.").

DELAWARE COURT OF CHANCERY ENFORCES UNAMBIGUOUS TERMS OF ADVANCE NOTICE BYLAW

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In *Strategic Investment Opportunities LLC v. Lee Enterprises, Inc.*,[1] the Delaware Court of Chancery upheld a board's rejection of a stockholder nomination notice due to noncompliance with the unambiguous terms of the corporation's advance notice bylaw relating to stockholder nomination of directors—namely, that the notice must be submitted by a record holder and that information regarding the nominees must be submitted on a form provided by the company. This recent opinion by Vice Chancellor Will, viewed alongside *Rosenbaum v. CytoDyn, Inc.* (another recent decision upholding the rejection of stockholder nominees due to deficiencies in the stockholder notice required by a company's advance notice bylaws),[2] indicates that the Delaware courts can be expected to continue to enforce the terms of advance notice bylaws that are adopted on a "clear day" and where there is no evidence of manipulation or other inequitable conduct by the board.

Background

On the date of the deadline for nominations under Lee Enterprises' advance notice bylaw, Strategic Investment Opportunities ("Opportunities"), a beneficial owner of Lee stock and the vehicle of a hedge fund that was concurrently making a bid for Lee, submitted a notice nominating directors for Lee's upcoming annual stockholder meeting. Rec-