

527 Washington State, becoming second state to enact general premerger notification law TEST

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Washington State and Colorado recently passed laws requiring merging parties to notify the state attorney general regarding certain transactions reportable under federal antitrust law. The new laws reflect increasing state interest and involvement in merger control. Transacting parties will need to consider the impact of these additional processes and the potential for increased scrutiny for their deals.

In June 2025, Colorado became the second state after Washington State to enact a general premerger notification statute.¹ Both statutes require, for certain transactions that are reportable to the federal antitrust authorities under the Hart-Scott-Rodino Act (HSR Act), parties to provide a contemporaneous notification to each of the Colorado and Washington State attorneys general (AGs). While a number of states already have industry-specific premerger notification requirements, largely related to healthcare provider transactions,² the Colorado and Washington State statutes apply regardless of industry. These statutes reflect a trend of increasingly active state merger enforcement.

The Colorado and Washington State statutes require pre-closing notice for deals with a local nexus

The Colorado and Washington State statutes require certain parties meeting the HSR thresholds to pre-notify the AG of each state by providing a copy of their HSR form contemporaneously with submission to the federal antitrust authorities. Unlike the HSR Act, the state laws are not suspensory, meaning they do not impose any waiting period or otherwise prevent the parties from closing. Neither state requires payment of a filing fee.³

Thresholds for notifications in Colorado and Washington State:⁴

Each statute includes largely the same criteria for determining which entities⁵ are required to notify the state AGs, namely:

- The entity has its principal place of business in the state; or
- The entity, or any entity it controls directly or indirectly, had annual net sales in the state of the goods and services involved in the transaction of at least 20% of the HSR Act transaction value threshold.⁶

The Washington State statute also requires notification for *any* HSR-reportable transaction, regardless of size, in which at least one of the merging parties is a certain type of healthcare provider or healthcare provider organization that conducts business in the state.⁷

What to file and when

The Washington State statute is effective as of July 27, 2025. The Colorado statute is anticipated to take effect on August 6, 2025. In both states, parties are subject to fines of up to \$10,000 per day for every day on which they are in violation of the requirement to notify.⁸ As of publication, however, representatives from both state AGs reported that they were working on technical solutions to be able to accept HSR forms. It is unclear when these procedures will be operational.

Both Colorado and Washington State require pre-notifying parties to provide, in addition to the HSR form itself, copies of the documentary attachments (i.e., the transaction-specific competition and synergy-related documents) to the HSR filing when any notifying party has its principal place of business in that state.⁹ Colorado also requires copies of the documentary attachments for parties meeting the net sales threshold.¹⁰ For Washington State, parties meeting the net sales or healthcare provider/healthcare provider organization thresholds are required to provide the documentary attachments within seven days after a request by the state Attorney General.¹¹

Confidentiality

Filings, related documents, and the information contained therein submitted to Colorado and Washington State are protected from public disclosure.¹² That said, each state can disclose information in judicial or administrative proceedings if the proposed merger is relevant to the proceeding or action and a protective order is in place.¹³ Colorado and Washington State can also share the filings and related documents and information with other state attorneys general in states that have enacted similar premerger notification statutes or statutes with equally protective confidentiality provisions.¹⁴

What's changed?

State laws requiring merging parties to provide state attorneys general information about transactions earlier in the review process alter the merger control landscape. Previously, states would have needed to request filings from merging parties or seek confidentiality waivers to permit federal authorities to share those materials. Having access to filings earlier will enable states to get involved in merger review sooner, with less effort. This is particularly relevant for those deals that may have an outsized impact in a particular state or a local community or where states perceive under-enforcement by federal antitrust authorities. Democratic state AGs also may continue to advance enforcement priorities of the Biden administration, particularly if they think that the Trump administration's antitrust enforcers are unlikely to do so.

While the Colorado and Washington State statutes do not require parties to suspend closing, the threat of a challenge by a state AG will inject uncertainty into the deal process. For example, when Sprint and T-Mobile were pursuing their merger, though the Department of Justice (DOJ) and some state AGs settled with the parties in July 2019 (allowing the deal to close, subject to certain divestitures), thirteen states and Washington, D.C. proceeded with a court challenge to the deal. That challenge was not resolved until February 2020 when a judge denied the states' request to enjoin the merger.¹⁵ More recently, the Washington State AG became the first antitrust authority to challenge the planned merger of supermarket chains Kroger and Albertsons in January 2024,¹⁶ over a month before the Federal Trade Commission (FTC) and several other state AGs filed their own complaint.¹⁷ The Colorado AG filed a third suit, which included allegations that the merging parties had entered into no-poach agreements in addition to arguments against the merger,¹⁸ and resulted in a temporary injunction freezing the deal in July 2024,¹⁹ before the parties ultimately abandoned the deal after judges in both the Washington State and FTC cases ruled against the companies in December 2024.²⁰ Transacting parties may need to focus on the potential impact of a proposed deal on particular states and prepare for any anticipated opposition.

Statutes foreshadow increasing state merger control enforcement

Given the willingness of states to take an active and independent role in merger review, it seems likely that the two newest state premerger notification laws will not be the last. The Colorado and Washington State statutes follow the July 2024 passage by the Uniform Law Commission (ULC) of a model state premerger notification law.²¹ The ULC's model law is intended to address transaction-related information asymmetries by "creating a ... non-burdensome mechanism for AGs to receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality

protections.”²² Because the merger notifications received by states that have enacted statutes can be shared with other states,²³ the “anticipated effect is to facilitate early information sharing and coordination among state AGs and the federal agencies.”²⁴ Versions of the ULC model statute are currently being considered in California, the District of Columbia, Hawaii, Nevada, and West Virginia.

States may modify the ULC model law (which Washington State did by adding a requirement for certain healthcare providers to notify). On June 5, 2025, the New York State Senate passed a premerger notification bill. This bill, which remains under consideration in the State Assembly (which will not be able to take action on the bill until the body reconvenes for regular business in January of 2026), is broader than the Colorado and Washington State statutes. It would require, subject to specified exemptions, any party doing business in New York to provide a copy of their HSR filing and all documentary attachments “at the same time” the HSR filing is provided to the federal antitrust agencies.²⁵ The New York bill also requires that the New York attorney general “consider [the] transaction’s effects on labor markets,” and establish a process for affected workers to “meaningfully comment” on any notified transactions.²⁶

Conclusion

Passage of the Colorado and Washington State premerger notification statutes, and the potential enactment of similar statutes in other states, adds another regulatory consideration for merging parties. As more states adopt premerger notification statutes, differing compliance requirements and enforcement priorities of state AGs may emerge. Tracking legislative developments in states where merging parties do significant business will be key to ensuring compliance with the evolving state-level antitrust landscape.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ 2025 Colo. Sess. Laws 2366, S.B. 25-126, 2025 Reg. Sess. (Co. 2025), <https://leg.colorado.gov/bills/sb25-126> (hereinafter "Colo. Stat."); 2025 Wash. Sess. Laws 40, S.B. 5122, 69th Leg., Reg. Sess. (Wash. 2025), <https://app.leg.wa.gov/bills/summary/5122?Initiative=False&Year=2025> (hereinafter "Wash. Stat.").
- ² See Lauren Norris Donahue, et al., *State Pre-Merger Notification Requirements for Healthcare Transactions: Increased Scrutiny for Small, Sub-HSR Transactions*, *The Health Lawyer* (Dec. 20, 2023). A notable exception is California, which, in 2023, passed a law requiring 180-day pre-notification of acquisitions of retail grocery or pharmacy businesses. See Cal. Corp. Code § 14700-14707, Cal. Stats. 2023, Ch. 457, Sec. 2. (AB 853), https://leginfo.ca.gov/?faces/?codes_?display?Section.xhtml??sectionNum=14700&?lawCode=CORP.
- ³ Colo. Stat., § 6-4.5-103(d) (providing that the state attorney general cannot charge a fee connected with the submission of the filing to the state); Wash. Stat., § 3(4) (same).
- ⁴ Colo. Stat., § 6-4.5-103(a); Wash. Stat., § 3(1).
- ⁵ As written, both statutes apply to individual "persons" (the definition of which includes businesses) rather than transactions, suggesting that only the specific parties to a transaction that meet the criteria outlined in the statute need comply, as opposed to all of the parties to the transaction.
- ⁶ Currently, the HSR transaction value threshold is \$126.4 million, 20% of which would be approximately \$25 million. "Goods or services" involved in the transaction refers to a "filing party's economic activity in the state [that] is in the same business category as involved in the acquisition." Uniform Law Commission, *Uniform Antitrust Pre-Merger Notification Act with Prefatory Note and Comments* (Sep. 16, 2024), <https://www.uniformlaws.org/viewdocument/final-act-104?CommunityKey=6bf5d101-d698-4c72-b7c1-0191302a6a95&?tab=library?documents>.
- ⁷ Wash. Stat., § 3(1)(c).
- ⁸ Colo. Stat., § 6-4.5-106; Wash. Stat., § 6.
- ⁹ Colo. Stat., § 6-4.5-103(b); Wash. Stat., § 3(2).
- ¹⁰ The Colorado statute, as drafted currently, provides that all parties must provide documentary attachments. We suspect, however, that this is a drafting error that will be corrected to be in line with the Washington State statute. We note that § 6-4.5-103(b) provides that an entity with its principal place of business in Colorado must provide all documentary attachments up front. But § 6-4.5-103(c) says that parties with their principal place of business in Colorado also must provide documentary attachments upon request of the state attorney general. However, until the statute is clarified, parties in Colorado should be prepared to provide all documentary attachments upon initial submission.
- ¹¹ Wash. Stat., § 3(3).
- ¹² Colo. Stat., § 6-4.5-104(a), (b); Wash. Stat., § 4(1), (2).
- ¹³ Colo. Stat., § 6-4.5-104(c); Wash. Stat., § 4(3).

¹⁴ Colo. Stat., § 6-4.5-105; Wash. Stat., § 5.

¹⁵ E.g., *New York et al. v. Deutsche Telekom AG et al.*, No. 1:19-cv-5434 (S.D.N.Y. 2020). A number of the states entered into individual settlements with the parties.

¹⁶ Press Release, Office of the Washington State Attorney General, AG Ferguson files lawsuit to block Kroger-Albertsons merger (Jan 15, 2024), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-block-kroger-albertsons-merger>.

¹⁷ Press Release, Fed. Trade Comm'n, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons>.

¹⁸ Press Release, Office of the Colorado Attorney General., Colorado Attorney General Phil Weiser files lawsuit to block proposed Kroger/Albertsons merger (Feb. 14, 2024), <https://coag.gov/2024/colorado-attorney-general-phil-weiser-files-lawsuit-to-block-proposed-kroger-albertsons-merger/>.

¹⁹ (Proposed) Stipulated Order for Temporary Injunctive Relief, *State ex rel. Weiser v. Kroger Co.*, No. 24CV30459 (Colo. Dist. Ct., Jul, 265, 2024).

²⁰ Opinion & Order, *FTC v. The Kroger Co.*, No. 3:24-cv-00347-AN (D. Or. Dec. 10, 2024); Findings of Fact and Conclusions of Law, *Washington v. The Kroger Co.*, No. 24-2-00977-9 (King Cty. Sup. Ct. Dec. 10, 2024).

²¹ Uniform Law Commission, *Uniform Antitrust Pre-Merger Notification Act* (July 24, 2024), <https://www.uniformlaws.org/?viewdocument/?2024-as-approved-act?CommunityKey=b5259c6c-f8e6-461d-86f8-0184eda403b1&tab=librarydocuments>.

²² Katie Robinson, *Two Uniform Acts and Amendments to Acts Approved at ULC's 133rd Annual Meeting*, Uniform Law Commission (July 24, 2024), <https://www.uniformlaws.org/discussion/two-new-uniform-acts-and-amendments-to-acts-approved-at-ulcs-133rd-annual-meeting>.

²³ As noted above, states can only share this information with other states have that have similar statutes or statutes with strong confidentiality protections.

²⁴ *Id.*

²⁵ S.B. 335, § 3 (N.Y. 2025), <https://www.nysenate.gov/legislation/bills/2025/S335>.

²⁶ *Id.* Affected workers would have ten days after the submission of the copy of the HSR filing to comment on the transaction.