BUSINESS LAW SECTION OF THE FLORIDA BAR
CORPORATIONS, SECURITIES & FINANCIAL SERVICES COMMITTEE

WHITE PAPER

PROPOSED ENACTMENT OF REQUIRED NOTICE FILING
WITH FLORIDA'S OFFICE OF ATTORNEY GENERAL FOR ENTITIES FILING A FORM
UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976

January 27, 2022

I. SUMMARY

House Bill 705 and Senate Bill 1112 (collectively the "Bill") propose to require any entity conducting business in Florida that submits an HSRA filing to provide written notice to the Florida's Office of Attorney General ("OAG") that the entity has submitted a Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSRA") filing at the same time that the HSRA filing is filed with the federal government. The Bill requires some type of written notice to be given to the OAG without taking into account the effect of Florida's sunshine laws (which would appear to expose to public disclosure the information in the notice that would otherwise remain confidential at the federal level). Because many of the terms in the text are not defined, the Bill leaves many questions unanswered, including who is subject to the filing obligation, what the notice needs to look like, and what information would need to be included in the notice. By triggering a notice filing based on an undefined "conducting business" standard, the Bill is vague and paints with too broad a brush, requiring a filing in Florida with respect to practically every HSRA filing made with the DOJ and the FTC. The Bill is in conflict with Florida's desire to be "business friendly" and would create an unnecessary burden on merger and acquisition transactions, in a space where monopolization risk is already adequately being monitored by the DOJ and the FTC through the HSRA filing and evaluation process. The Bill is also unnecessary because the Florida Antitrust Act of 1980 and the Florida Deceptive and Unfair Trade Practices Act are broad enough to encompass the types of violations addressed by the federal Clayton Act. As such, the Florida legislature should not rush to adopt the Bill, certainly not in the 2022 legislative session, opting instead for a careful and detailed study that would include obtaining appropriate input from those who are involved in making HSRA filings.

II. HSRA FILING PURPOSE AND PROCEDURE

Under the HSRA, United States federal antitrust authorities must be given the opportunity through a premerger notification reporting process, before a transaction may be consummated, to evaluate the anticompetitive effect of certain mergers, acquisitions, and joint ventures (largely based on size of transaction and size of the involved parties) (any entity subject to the filing requirements of HSRA referred to for purposes of this White Paper as "filing companies" or a "filing company"). The purpose of the HSRA filing, as noted by the Bill's Staff Analysis, is to prevent unfair methods of competition by allowing the Antitrust Division of the Department of Justice ("DOJ") and the

Federal Trade Commission ("FTC") time to review a proposed transaction that might otherwise stifle competition if unchecked. Failure to submit an HSRA filing when required, to proceed with a transaction before the waiting period has expired, or to proceed with a transaction that the DOJ or FTC expressly disapproves after evaluating the prenotification filing, may subject an entity to hefty civil penalties.

A filing company must notify both the FTC and the DOJ and wait until the applicable waiting period has passed without any agency disapproval before they can close on the transaction. These filing companies must submit an HSRA premerger notification form that requires disclosure of certain material information and documents regarding the companies and the proposed transaction, and pay a filing fee.

The information included in the HSRA Form is exempt from Freedom of Information Act disclosure and is kept confidential. The filing companies may request early termination of the waiting period which the reviewing agency may grant if it has determined that the transaction poses no threat to competition. If the filing companies request early termination and the reviewing agency grants the request, the names of the parties to the transaction are published in the Federal Register. Alternatively, the filing companies may wait for the waiting period to lapse, at which point they may proceed to consummate the transaction.

A completed HSRA Form contains information, much of which is highly confidential, including but not limited to the ultimate parent entity of the filing company; the proposed parties to the transaction; the nature and structure of the transaction; the consideration proposed to be paid in the transaction; recent annual reports and annual audit reports of the filing company and of certain of its subsidiaries; revenue information by North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) codes for operations conducted within the United States and of foreign manufacturing operations if products are sold in or into the United States; 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 filing company; a list of minority stock and non-corporate interest holdings of more than 5% but less than 50% in certain other entities; and copies of party documents including presentations and emails created for the sale of the company being acquired that often contain competition-related content or that discuss synergies or efficiencies as set forth in the HSRA rules.

III. ANALYSIS

The text of the Bill reads:

> 542.275 Mergers and acquisitions reporting; notice required. Any entity *conducting business* in the state which is required to file the Notification and Report Form for Certain Mergers and Acquisitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. s. 18a(a), shall provide *written notice* of such filing to the Office of the Attorney General at the same time that notice is filed with the Federal Government. (Emphasis added).
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> Section 2. This act shall take effect July 1, 2022.

An analysis of the Bill indicates that the Bill is ambiguous, and will likely have unintended consequences in a number of ways:

1. As a threshold matter, the Bill would create a lack of clarity as to which entities and transactions it would apply. The Bill would presumably be triggered by any business with a minimal nexus to Florida because "conducting business" remains vague and undefined. Indeed, a company that would otherwise have no nexus to Florida except for perhaps the fact that it is absorbing a company that happens to have some minimum contacts with Florida, would presumably be required to file a written notice with Florida's Attorney General. And, this ambiguity may cause serious harm in the form of risk to exposure to civil claims under Chapter 542 (discussed further below).

2. Given the global nature of business today, practically every transaction that triggers an HSRA filing would also trigger a notice filing in Florida under this Bill, even if the dollar amount of business conducted in Florida is small on both a quantitative and qualitative basis.

3. The Bill does not take into account the negative impact that it would have on a filing company if it were to inadvertently obviate the HSRA's intentional confidentiality protection which would be destroyed if, pursuant to the Sunshine Laws governed by Florida's Chapter 286, a records request was made concerning a filing company's written notice made pursuant to this Bill; especially if that request came prior to the HSRA waiting period lapsing.

4. The Bill is organized under Florida Chapter 542; the chapter responsible for implementing laws regarding the restriction of trade or commerce in Florida. Because §542.21 includes civil penalties for violations of the chapter and provides for a private cause of action under § 542.22, it ostensibly would include a private cause of action against any entity that is subject to the Bill's notice filing requirement and fails to do so, even if such failure is inadvertent.

5. The Bill provides no guidance on what must be included in the "written notice," leaving businesses uncertain of how to comply with the notification obligation.

6. The Bill is also unnecessary because the Attorney General has already stated that the Florida Antitrust Act of 1980 and the Florida Deceptive and Unfair Trade Practices Act is broad enough to encompass the types of violations encompassed by federal Clayton Act. This point was recognized in the Staff analysis of the Bill.

7. Finally, and of critical significance, the Bill would have the effect of chilling merger and acquisition activity, including most of such activity which is procompetitive, because it runs counter to the protections of the HSRA, which protects the confidentiality of the premerger notification filings made with the DOJ and FTC until a requested early termination is granted, or in the absence of such a request, until either the transaction is closed or one or both of the agencies proceeds with an action seeking to prohibit the consummation of the transaction. The Bill does not take into account the very real negative impact that it would have on a filing company that would often occur by making the pendency of the transaction open to premature public knowledge, in light of Florida's Sunshine Laws found in Chapter 286, Florida Statutes.

All in all, the consequences and impact of this seemingly innocuous Bill, in its application, actually has far reaching effects, is likely to undermine competition (contrary to its claim of being pro-competitive), tends to add unnecessary regulation in a state that is touting itself as business friendly, tends to expose companies to risks of greater private litigation without adding a commensurate benefit, and thus might give anyone doing business in Florida pause.

IV. CONCLUSION

The Florida Business Law Section opposes the Bill in its current form, believes that there is a need for careful and detailed study over an extended time period that would include appropriate input from those who are involved in making HSRA filings, and suspects that such study and evaluation will lead to a conclusion that any notice filing, even if limited to entities that significantly touch Florida and even if an exception to the Sunshine Laws could be included, will add little to protect competition while adding an unnecessary and peculiar burden for businesses conducting business in the State. The Bill, if passed as written, will likely have direct negative consequences on business activity in the State and thus on the State in that it will result in unnecessary litigation, and unnecessary additional regulatory burden. In short, this Bill weighs more heavily in favor of creating problems than it does in providing a solution and should not be adopted.