1. **Should New York revise the Donnelly Act so that it includes an analogue to Section 7 of the Clayton Act?**

While states were the first to adopt general purpose antitrust laws, the federal antitrust laws including Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act have become standard bearers.[1] Indeed, many state antitrust laws now explicitly mirror the federal laws in language or interpretation.[2] In New York, the Donnelly Act remains divorced from federal law in several important ways, many of which have been catalogued by the Antitrust Committee previously.[3]

One noted diversion is the Donnelly Act's lack of a Section 7 analogue. Section 7 of the Clayton Act expressly prohibits mergers and acquisitions whose effect "may be substantially to lessen competition."[4] The Donnelly Act contains no such similar language, and instead its language more closely tracks that of Section 1 and Section 2 of the Sherman Act. Other state antitrust laws do have Section 7 analogues,[5] and so the Merger Committee has sought to address whether New York should revise the Donnelly Act to incorporate language similar to Section 7-

[1] The Antitrust Committee of The Commercial and Federal Litigation Section of the New York State Bar Association, *Experiments in the Lab: Donnelly Act Diversions from Federal Antitrust Law*, at 1 n.1 (2010), https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/DonnellActDiversions-CorrectedGinsburgversion_pdf.html ("2010 Donnelly Act Report") (citing Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System*, 1a-5a).

[2] *See, e.g.*, Connecticut's antitrust statute, Conn. Gen. Stat. § 35-44b ("in construing" the state's antitrust provisions, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes.").

[3] 2010 Donnelly Act Report (studying divergent treatment of professional and non-profit organizations, state action doctrine, and class action provisions under the CPLR).

[4] 15 U.S.C. § 18.

[5] The following states (and Puerto Rico) have adopted analogues to Section 7 of the Clayton Act: Alaska. See Alaska Stat. § 45.50.568; Colorado. (Colo. Rev. Stat. § 6-4-107(2) (prohibits state attorney general from using the statute to challenge a merger reviewed and not challenged under the Clayton Act by federal antitrust enforcers)); Hawaii. (Haw. Rev. Stat. § 480-7 (does not apply to mergers approved by any federal regulatory agency)); Idaho. (Idaho Code Ann. § 48-106); Louisiana. (La. Rev. Stat. Ann. § 51:125(B)(1)-(3)); Maine (Me. Rev. Stat. Ann. tit. 10, § 1102-A); Mississippi. (Miss. Code. Ann. § 75-21-13); Nebraska. (Neb. Rev. Stat. § 59-1606(1)); Nevada. (Nev. Rev. Stat. §§ 598A.060(1)(f) and (2), 711.240(3)); New Jersey. (N.J. Stat. Ann. §§ 56:9-4.c and 14:3-10); Oklahoma. (Okla. Stat. Ann. tit. 79, § 208); Puerto Rico. (P.R. Laws Ann. tit. 10, § 261); Texas. (Tex. Bus. & Com. Code Ann. § 15.05(d)); Washington. (Wash. Rev. Code Ann. § 19.86.060).

in order to more effectively enforce the antitrust laws in the context of an anticompetitive merger or acquisition. As noted below, we do not believe such a revision is necessary.

In its 2010 report considering the same issue, the Antitrust Committee determined that any revision to include a Section 7 analogue would be unnecessarily redundant for several reasons. First, Sections 1 and 2 of the Sherman Act grant enforcement agencies as well as private parties the appropriate tools to challenge anticompetitive mergers and acquisitions, notwithstanding their tendency to bring such claims only under Section 7 of the Clayton Act.[6] Second, the New York Court of Appeals has held that the Donnelly Act should be interpreted in light of Sherman Act precedents.[7] Thus, where courts have held that the Sherman Act permits merger enforcement under the Sherman Act, the same should result under the Donnelly Act. Third, the language of the Donnelly Act itself reinforces the statute's applicability to mergers where it 1) expressly prohibits conduct that creates or maintains a monopoly, as does Section 2 of the Sherman Act, and 2) applies to conduct where the effect "may be" to substantially lessen competition, thereby matching Section 7's incipiency characteristic.[8] Finally, the lack of an analogue does not appear to limit New York enforcement agencies' ability to review merger activity.[9]

The Merger Committee agrees with the Antitrust Committee's prior conclusions. There is no valid reason to adopt a Section 7 analogue. Further, there do not appear to be any substantial

[6] 2010 Donnelly Act Report at 44-52 (analyzing the historical trend away from Sections 1 and 2 and toward Section 7 for merger enforcement, but appropriately noting that courts had never foreclosed the use of Sections 1 and 2 and more recent decisions, including those by Judge Richard Posner, affirmatively blessed the continued use of Sections 1 and 2 to challenge mergers).
[7] *Id.* at 44-45 (citing *Anheuser Busch, Inc. v. Abrams*, 71 N.Y.2d at 334-35 (1988)).
[8] *Id.* at 49-50; *See* Donnelly Act, N.Y. Gen. Bus. Law § 340(1) (expressly prohibiting agreements "whereby a monopoly. . . is or may be established or maintained" or "whereby [f]or the purpose of establishing or maintaining any such monopoly . . . any business, trade or commerce. . . is or may be restrained.").
[9] *Id.* at 50-52 (collecting enforcement actions).

changes in the law or enforcement practice since the 2010 report that would necessitate reconsideration of adopting a Section 7 analogue.[10]

2. Should New York remove the lone statutory merger pre-notification requirements that apply to non-profit organizations?

Because New York's Donnelly Act does not include a Clayton Act Section 7 analogue, there is consequently no pre-merger notification regime akin to the federal requirements set out in the Clayton Act as amended by the Hart-Scott-Rodino Antitrust Improvements Act.[11] New York is not an outlier on this issue; no other states have a full pre-merger notification regime comparable to the HSR requirements. However, several states have implemented industry-specific pre-merger notification requirements, including New York.[12] In New York, certain non-profit organizations seeking to enter into a proposed merger or consolidation are required to notify the New York Attorney General ("NY AG") and receive approval from the New York Supreme Court.[13]

Given the burdensome costs and government resources that can accompany robust notification regimes, the Mergers Committee sought to address whether New York should

[10] Indeed, subsequent to the 2010 report, the Second Circuit has reaffirmed the Donnelly Act's applicability to merger challenges. *City of New York v. Group Health Inc.*, 649 F.3d 151, 158 (2d Cir. 2011) (holding that the antitrust analysis for market power in a merger challenge would be the same whether the plaintiffs brought their case under the Sherman Act, the Clayton Act, or the Donelly Act.).

[11] 15 U.S.C. § 18a.

[12] The following states have adopted pre-merger notification requirements for mergers or acquisitions in various industries: Alabama – insurer mergers. (Ala. Code § 27-29-3.1); Kansas – insurer mergers. (Kan. Stat. Ann. § 40-510(a)(3)); Nevada – gaming institutions, financial institutions, insurers, and public utilities. (Nev. Gam. Reg. 3.070(6)-(8) (gaming); Nev. Rev. Stat. §§ 692C.256 (insurers), 666.035 (financial institutions), 704.329 (utilities)); New Jersey – financial institutions. (N.J. Stat. Ann. §§ 17:9A-413.a(2), 17:12B-84); New York – non-profit mergers. (N.Y. Stat. Ann. § 907); North Carolina – banks, insurers, and savings and loans associations. (N.C. Gen. Stat. §§ 53C-7-101 to -209 (banks), 58-7-150 (insurers), 54-159 to -166 (savings and loans)); North Dakota – insurers. (N.D. Cent. Code § 26.1-10-03(4)); Tennessee – banks, business and industrial development corporations, and insurers. (Tenn. Code. Ann. §§ 45-2-103 (banks), 45-8-214 (business and industrial development corporations), 56-11-103, -104 (insurers)).

[13] N.Y. Stat. Ann. §§ 901-910; *see also* New York Attorney States Office of the Attorney General, Charities Bureau, *A Guide to Mergers and Consolidations of Not-for-profit Corporations Under Article 9 of The New York Not-for-profit Corporation Law*, https://www.charitiesnys.com/pdfs/mergers.pdf (detailing applicability of Article 9 to different categories of not-for-profit organizations).

consider eliminating the notification requirements for merging or consolidating non-profit organizations. Ultimately, we would recommend not eliminating the notification requirements for the reasons set forth below.

It is the Merger Committee's understanding that the pre-merger notification requirements set out in Article 9 of the Not-for-profit Law were enacted to advance important state goals in addition to, but apart from, antitrust review. Specifically, the Attorney General has been given an oversight role for non-profit mergers and acquisitions to protect the interests of the donors and beneficiaries of the organizations, as well as prevent the appropriation of assets of a non-profit organization to benefit an individual. Additionally, it is the Merger Committee's understanding that Article 9 pre-merger notification is most frequently triggered and substantially needed in the context of proposed mergers of hospitals or other health care providers – organizations that the state has a particular interest in overseeing given its concerted efforts to manage medical expenses and the availability of health care services in the state. Given these important considerations, we do not believe the pre-merger notification requirements should be eliminated.

3. Should New York revise the Donnelly Act to require parties to submit to the NY AG's Office, at its request, the same premerger notification materials provided to the U.S. DOJ and FTC?

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended[14] (the "HSR Act") and related premerger notification regulations,[15] merging parties must file premerger notification materials with the Antitrust Division of the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") for transactions meeting certain thresholds, and not close the transactions before until the expiration of a prescribed waiting period. During this 30-day

[14] 15 U.S.C. § 18a.
[15] *See* 6 C.F.R. Parts 801-803.

window, the federal agencies will evaluate whether the transaction is likely to have any anticompetitive effects. If, following its preliminary review, at the end of the initial waiting period, the investigating agency believes that the transaction is likely to lead to anticompetitive effects or that further information is required to complete the competitive analysis, it will conduct a more burdensome, in-depth investigation through a process known as a Second Request.[16] Examples of materials that parties must submit during the premerger notification process are competitive studies prepared by or for officers or directors of a party to the transaction (including documents prepared by third-party advisors)[17] which analyze competitors, markets and/or transaction synergies or efficiencies.[18]

As noted above, currently no state has a comprehensive premerger notification program akin to the federal HSR regime. Thus, the NY AG does not *automatically* receive the same materials that parties provide to the federal antitrust agencies before closing certain

[16] *See Pharm. Res. & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95, 122 (D.D.C. 2014), *aff'd*, 790 F.3d 198 (D.C. Cir. 2015) ("[T]he express statement of purpose by the Senate and House upon passage of the HSR Act was to combat illegal acquisitions that violate antitrust laws."); FTC Premerger Notification Office, *What is the Premerger Notification Program?: An Overview* at 2 (rev. ed. 2009) ("The Program was established to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anticompetitive acquisitions after they have occurred."), *available at* https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[17] The instructions for Item 4(c) of the filing provided to the federal antitrust agencies requires parties to "[p]rovide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets." *See* U.S. FTC Premerger Notification Office, *Instructions: Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions* at VI (effective June 25, 2018), *available at* https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_instructions_-_06-25-18.pdf.

[18] The Item 4(d)(i) instructions oblige parties to produce "all Confidential Information Memoranda prepared by or for any officer(s) or director(s) . . . of the [ultimate parent entity] of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets." *Id.* Item 4(d)(ii) requires parties to submit "all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors . . . for any officer(s) or director(s) . . . of the [ultimate parent entity] of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets." *Id.* Item 4(d)(iii) requires submission of "all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition." *Id.*

transactions.[19] Nor can the federal agencies provide the NY AG copies of the materials they receive under the premerger notification program absent the merging parties' consent due to confidentiality provisions in federal law.[20]

Nevertheless, there appears to be no need for a legislative solution because the NY AG already has the ability to access materials submitted as part of the HSR process. Under its general subpoena authority, the New York AG's Office may issue enforceable subpoenas to require production of materials to assist its merger investigations.[21] In practice, the AG's Office can and often does subpoena parties to produce copies of all materials provided to the federal antitrust agencies, as well as additional materials not automatically required to be produced under federal law. Accordingly, the NY AG already has the tools to gather the necessary materials to conduct its merger investigations and ensure that mergers comply with New York law. Therefore, the Mergers Committee believes there is no need to revise the Donnelly Act to require merging parties to provide the same premerger notification materials that they provide to the federal agencies.

4. Should New York Revise the Donnelly Act to Harmonize with Federal Law and Require the NY AG's Office to Hold Submitted Materials Confidential?

The Mergers Committee offers a divided recommendation as to the fourth question. Although some members recommend revising the Donnelly Act to oblige the NY AG's office to

[19] The only exception appears to be Connecticut, which requires merging parties in the healthcare industry to provide the Connecticut Attorney General's office, at its request, copies of the premerger notification materials provided to the federal antitrust agencies, and merging parties in the motor fuel industry automatically to file a copy of all federal premerger notification materials with the Connecticut Attorney General's office. *See* Conn. Gen. Stat. § 19a-486i(b) (healthcare industry); Conn. Gen. Stat. § 42-511(a) (motor fuel industry).

[20] *See Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) ("[W]e agree with the FTC that section 7A(h)'s limitation on the disclosure of premerger information to the 'public' precludes confidential disclosure to state law enforcement officials."); *Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985) ("[T]he language of § 7A(h) and the statements of its legislative proponents on their face preclude disclosure of premerger materials to state attorneys general.").

[21] *See, e.g.*, N.Y. Gen. Bus. Law § 343 ("The attorney general may also require such other data and information as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter."); N.Y. Civ. Prac. Law & Rules § 2302(a) (authorizing the attorney general to issue subpoenas).

treat materials received voluntarily or pursuant to compulsory process as confidential, others do not see a need for such changes to the Donnelly Act.

By way of background, federal law requires the U.S. DOJ and FTC to hold HSR Act materials confidential and not publicly disclose them except as relevant to an administrative or judicial action or proceeding.[22] In addition, HSR Act materials are expressly exempt from disclosure under the U.S. Freedom of Information Act and "may not be disclosed to state or foreign enforcement agencies or to third parties during depositions or interviews without the consent of the party producing the material."[23] Furthermore, materials obtained pursuant to a federal agency's Civil Investigative Demand "may not be disclosed to persons outside the federal government without the consent of the provider."[24]

No analogous confidentiality obligations appear to exist under New York law. Indeed, Section 343 of the General Business Law expressly authorizes the NY AG to make information obtained in an investigation public even if it reflects highly sensitive trade secrets produced pursuant to a subpoena with which private parties must comply.[25] Nor does New York law guarantee producing parties that their sensitive materials in the NY AG's files will be exempt from disclosure pursuant to the Freedom of Information Law ("FOIL") unless the NY AG makes a specific promise of confidentiality.[26]

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[22] *See* U.S. Dep't of Justice, *Antitrust Division Manual* at III-30 (2012) ("Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), provides that HSR Material ('[a]ny information or documentary material' filed with the Division or the FTC pursuant to the HSR Act) may not be made public except 'as may be relevant to any administrative or judicial action or proceeding.'"), *available at* https://www.justice.gov/atr/file/761141/download.

[23] *Id.* at III-31.

[24] *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 571 (1983) (citing 15 U.S.C. § 1313).

[25] *See* N.Y. Gen. Bus. Law § 343 ("Such inquiry may upon written authorization of the attorney general be made public."); *Ragusa v. N.Y. State Dep't of Law*, 152 Misc. 2d 602, 606 (N.Y. Sup. Ct. 1991) ("The Attorney-General, himself, is expressly authorized by the statute, to reveal such information at any time during his investigation; and occasionally does by press conference or otherwise.").

[26] *See Abdul-Rashid v. N.Y.C. Police Dep't*, 31 N.Y.3d 217, 225 (2018) ("All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that 'the material requested falls squarely within the ambit of one of [the] statutory exemptions.") (citation omitted); *Ragusa v. N.Y. State Dep't of Law*, 166 Misc. 2d 157, 160 (N.Y. Sup. Ct. 1992) ("[T]he Attorney General's promise of confidentiality will be

Arguments for Revisions to the Donnelly Act

Some members of the Mergers Committee would recommend that the New York legislature consider revisions to the Donnelly Act that would require the NY AG to keep confidential any materials received pursuant to compulsory process and produced voluntarily, and to exempt the NY AG's investigative files, including produced materials, from disclosure under FOIL. As shown below, a number of states have taken an approach more in line with the federal agencies to protect the confidentiality of materials received during antitrust investigations from disclosure by their attorneys general except in limited circumstances and from disclosure to the public pursuant to their respective state freedom of information laws. For instance:

- Arkansas law provides that "[u]nless otherwise ordered by a court for good cause shown, no statement or documentary material produced pursuant to a demand under this section shall be produced for inspection or copying by, nor shall the contents thereof be disclosed to, any person other than the authorized employee of the Attorney General without the consent of the person who produced the material."[27]
- Ohio law prohibits the attorney general from "disclos[ing] publicly the facts developed in an investigation . . . unless the matter has become a matter of public record in enforcement proceedings, in public hearings, or other official proceedings, or unless the person from whom the information has been obtained consents to the public disclosure."[28]

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respected."); *Ragusa*, 152 Misc. 2d at 607 ("There is no merit to the Attorney General's claim that [N.Y. Gen. Bus. Law § 343] requires him to keep evidence of a law breaker's act in perpetual confidence; or that this surviving relic of royal prerogative, executive privilege, in any way interdicts the Freedom of Information Law."). *But see James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. New York*, 27 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2010) (distinguishing *Ragusa* and allowing the NY AG to exempt production of documents where "the investigation remains ongoing").

[27] Ark. Code Ann. § 4-88-111(b).

[28] Ohio Rev. Code § 1331.17.

- Massachusetts requires its attorney general to hold materials confidential and not disclose them except as necessary in a case.[29]
- California also requires its attorney general not to disclose private information or evidence obtained during investigations and exempts disclosure of investigative files under the California Public Records Act.[30]
- Connecticut law provides that documentary material furnished to the Connecticut Attorney General pursuant to a demand or voluntarily "shall not be available to the public."[31]
- Oklahoma law allows its attorney general to disclose trade secrets or confidential information only after filing a petition in state court for an order authorizing disclosure.[32]
- Texas prohibits its attorney general from disclosing materials without the consent of the providing parties except in the case of a contrary court order.[33]

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[29] Mass. Gen. Laws ch. 93 § 8 ("All information and documents, including answers to interrogatories, transcripts or testimony, produced documents, and all copies thereof, which are obtained by the attorney general in the course of any investigation under this chapter shall be held in the custody of the attorney general, shall be kept confidential by the attorney general, and shall not be disclosed by the attorney general to any person except as necessary in a case brought by the attorney general under this act.).

[30] Cal. Gov. Code § 11183 ("Except in a report to the head of the department or when called upon to testify in any court or proceeding at law or as provided in Section 11180.5 or subdivisions (g) and (h) of Section 11181, an officer shall not divulge any information or evidence acquired by the officer from the interrogatory answers or subpoenaed private books, documents, papers, or other items described in subdivision (e) of Section 11181 of any person while acting or claiming to act under any authorization pursuant to this article, in respect to the confidential or private transactions, property or business of any person.").

[31] Conn. Gen. Stat. § 35-42(c)(1), (c)(2).

[32] Okla Stat. Title 79 § 210(G)(1) ("Not later than fifteen (15) days prior to disclosing under this subsection any documentary material or answers to written interrogatories designated as containing trade secrets or confidential information, the Attorney General shall notify the person who produced the material of the Attorney General's intent to make the disclosure. After providing such notification, the Attorney General may petition a district court in any county of this state in which the person resides, does business, or maintains its principal office for an order authorizing disclosure of the trade secrets or confidential information. After notice and hearing, if so ordered, the Attorney General may disclose the trade secrets or confidential information.").

[33] Tex. Bus. & Commerce Code § 15.10(i)(1) ("Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained."); *see In re Memorial Hermann Healthcare System*, 274 S.W.3d 195, 199 (Ct. App. 2008) ("Read in context, section (i)(1) precludes the attorney general—but nobody else—from disclosing CID

- Washington, D.C. specifically exempts materials produced voluntarily and pursuant to Civil Investigative Demands from the D.C. Freedom of Information Act and requires such materials to "be kept confidential by the Corporation Counsel before bringing an action" unless confidentiality is waived.[34] The only exception is that such materials may be disclosed to a federal or state law enforcement agency upon prior certification that the materials "will be maintained in confidence and will be used only for official law enforcement purposes."[35]

Additionally, the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General requires participating agencies "to protect confidential information and materials . . . from improper disclosure" and to "agree to take all appropriate steps to maintain [the] confidentiality" of confidential information received from another agency.[36]

Some members of the Mergers Committee believe that taking an approach more in line with the foregoing states would represent sound public policy. In their view, the current lack of confidentiality guarantees has a number of significant potential drawbacks that could harm New York businesses and, ultimately, undermine the enforcement mission of the NY AG. Those drawbacks include:

- Incentivizing businesses not to produce materials voluntarily to the NY AG that would assist the NY AG's investigations or otherwise cooperate with the NY AG;

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materials unless either (1) the producing person consents, or (2) the person seeking to examine the materials obtains a court order permitting access.") (citation omitted).

[34] D.C. Stat. § 28-4505(k).

[35] *Id.*

[36] U.S. Department of Justice, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (last visited Sept. 4, 2018), https://www.justice.gov/atr/protocol-coordination-merger-investigations-between-federal-enforcement-agencies-and-state.

- Investigative delays caused by the NY AG and recipients of document subpoenas negotiating confidentiality assurances;
- Significant costs on New York businesses for counsel's time negotiating confidentiality assurances with the NY AG;
- Administrative costs in evaluating FOIL requests for confidential materials on a case-by-case basis;
- Undermining the willingness of federal agencies and other state attorneys general to cooperate closely with the NY AG in antitrust investigations; and
- Discouraging business innovation and growth in New York by undermining confidence that highly sensitive trade secrets acquired at enormous effort and expense will not be publicly disclosed or made available to competitors, or even worse disclosed for political purposes unrelated to the NY AG's law enforcement mission.

In contrast, they perceive the benefits of the status quo as quite modest. Although the current approach provides the NY AG with considerable flexibility to share information and cooperate with other state attorneys general, they believe there are less restrictive means to preserve this flexibility without the foregoing drawbacks. For instance, New York could adopt Massachusetts's and Washington's approaches of allowing attorneys general to disclose information and evidence to federal and state antitrust agencies provided "that prior to such disclosure the attorney general shall obtain a written agreement from such officials to abide by the restrictions of this section and any orders entered pursuant to this section."[37] Or New York could pass a provision like Connecticut's, which states: "The Attorney General shall cooperate

[37] Mass. Gen. Laws ch. 93 § 8; *see* Wash. Rev. Code § 19.86.110(7)(b) ("The attorney general may provide copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony to an official of this state, the federal government, or other state, who is charged with the enforcement of federal or state antitrust or consumer protection laws, if before the disclosure the receiving official agrees in writing that the information may not be disclosed to anyone other than that official or the official's authorized employees.").

with officials of the federal government and the several states, including but not limited to the sharing and disclosure of information and evidence obtained under the purview of this chapter."[38] Those members believe that either approach would represent a meaningful reform that would enable the NY AG to retain the flexibility needed for its enforcement activities while strengthening confidence among New York businesses that their trade secrets will not be improperly disclosed.

Arguments Against Revisions to the Donnelly Act

Some members do not agree with revising the Donnelly Act to require confidential treatment of submitted materials. They see the above confidentiality proposals as solutions in search of a problem for the following reasons:

- *First*, they perceive the confidentiality provisions of the Hart-Scott-Rodino Act as working in tandem with the premerger notification provisions. They thus believe that Congress gave heightened confidentiality protections to merging parties in exchange for premerger notification requirements as a kind of quid pro quo.
- *Second*, they believe that the drawbacks of not having confidentiality protections listed above are all theoretical. They are unaware of any evidence or argument demonstrating that the public interest generally or economic growth more specifically have been harmed by a lack of strict statutory confidentiality guarantees. And in their experience the absence of such guarantees from the Donnelly Act has not impeded the NY AG's ability to secure confidentiality assurances in a timely manner, cooperate with state and federal agencies, or secure voluntary cooperation from businesses.

[38] Conn. Gen. Stat. § 35-42(g).

- *Third*, they see the benefits of not having confidentiality requirements as considerable. From their perspective, the NY AG has been able to negotiate confidentiality agreements suited to the interests of each party and the issues specific to the different kinds of inquiries it undertakes. They believe the flexibility of Section 343 is important for the NY AG's office in conducting its investigations.

In short, some members believe that all parties are better served by the status quo, or a proposal linking heightened confidentiality protections with premerger notification.

Mergers Committee members favoring a confidentiality requirement do not agree with the above arguments. As noted above, no state has a mandatory, broad premerger notification program akin to the federal HSR program, yet many have confidentiality protections. Thus, some members dispute that confidentiality protections should be linked with premerger notification requirements. Although they are unaware of instances where businesses have suffered harm from the release of confidential information, they believe such harm is difficult to quantify and the mere threat of it could make potential witnesses less inclined to cooperate with the NY AG.