



Office of Commissioner  
Andrew N. Ferguson

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioner Andrew N. Ferguson  
Regarding the FY2023 HSR Annual Report to Congress  
Commission File No. P859910**

October 10, 2024

I share Commissioner Holyoak’s view that we need clear criteria about which transactions should go in the report and how to classify them to avoid potential gamesmanship and confusion.<sup>1</sup> This problem dates back many years, and has gone unaddressed in Commissions controlled by both parties. We are overdue for a correction.

The lack of clear criteria—and the resulting risk of confusion—is illustrated by the Commission’s and Antitrust Division’s divergent approaches towards presenting litigation results. The Commission notes in a table that it filed and litigated four complaints in Fiscal Year 2023.<sup>2</sup> The table lists the outcomes of those four complaints in rows below: one victory, two pre-decision settlements, and one still in litigation.<sup>3</sup> In a footnote, the Commission also describes the 2023 outcome of a complaint filed in a prior year.<sup>4</sup> In its corresponding table, the Antitrust Division takes a different approach. Like the Commission, it notes the number of complaints filed in 2023.<sup>5</sup> But, for the totals of each outcome, it includes complaints filed in prior years that resulted in an outcome in 2023.<sup>6</sup> Although the tables look very similar, the two agencies are using different methodologies to generate them. The methodological discrepancy makes it difficult to compare the agencies’ respective reports, and diminishes the value of the report. The discrepancy also likely would go unnoticed by all but the most careful reader. The agencies should agree on a single methodology for the report and clearly explain the methodological choice to Congress.

Were this report due to Congress imminently, I would alert Congress to the methodological faults it contains and concur in its issuance. These problems—again, most of which have featured in every report for years—are insufficient to justify breaching our statutory duty to submit this report to Congress. But the report is not due imminently. The law requires us to issue this report “annually,” and not necessarily at the conclusion of the fiscal year.<sup>7</sup> We issued the most recent report on December 21, 2023. The Commission under Chair Khan has not submitted this report to

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<sup>1</sup> See Dissenting Statement of Melissa Holyoak, Comm’r, Fed. Trade Comm’n, Regarding the FY2023 HSR Annual Report to Congress, FTC Matter No. P859910 (Oct. 10, 2024).

<sup>2</sup> Fed. Trade Comm’n & U.S. Dept. of Just., Hart-Scott-Rodino Annual Report, Fiscal Year 2023, at 3 (Oct. 10, 2024).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.* at 3, n. 5.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Ibid.*

<sup>7</sup> Consolidated Appropriations Act, Pub. L. No. 117-328, § 102, 236 Stat. 4459, 5968 (2022).

Congress earlier than November 8, and once did not issue it until February of the next year.<sup>8</sup> This report, therefore, is the first such report the Commission will have submitted to Congress before Election Day since the Chair assumed her office. And it is being released on the heels of the Democratic presidential candidate's economic policy plan calling for greater merger enforcement.<sup>9</sup> I doubt the concurrence of these events is a coincidence.

We still have time to address the methodological confusion in the report before submitting it to Congress. We should use that time. I therefore respectfully dissent.

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<sup>8</sup> FTC, DOJ Issue Fiscal Year 2022 Hart-Scott-Rodino Notification Report, Fed. Trade Comm'n Press Release (Dec. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-issue-fiscal-year-2022-hart-scott-rodino-notification-report>; FTC, DOJ Issue Fiscal Year 2021 Hart Scott Rodino Premerger Notification Report, Fed. Trade Comm'n Press Release (Feb. 10, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-doj-issue-fiscal-year-2021-hart-scott-rodino-premerger-notification-report>; FTC Approves Fiscal Year 2020 Hart-Scott-Rodino Premerger Notification Report, Fed. Trade Comm'n Press Release (Nov. 8, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-fiscal-year-2020-hart-scott-rodino-premerger-notification-report>.

<sup>9</sup> Harris-Walz Campaign, A New Way Forward for the Middle Class, 15, 22 (Sep. 2024), [https://kamalaharris.com/wp-content/uploads/2024/09/Policy\\_Book\\_Economic-Opportunity.pdf](https://kamalaharris.com/wp-content/uploads/2024/09/Policy_Book_Economic-Opportunity.pdf).