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**October 10, 2024**

The Consolidated Appropriations Act of 2023 (CPA) requires that the “Federal Trade Commission and Department of Justice shall jointly and annually report to the Congress on the operation of [the Hart-Scott-Rodino Act (HSR Act)].”<sup>1</sup> The Commission provided much of the information required by the CPA for the preceding year via a summary on July 1.<sup>2</sup> And now, as required by the CPA, the Commission files its Hart-Scott-Rodino Annual Report (HSR Annual Report). Yet today’s HSR Annual Report counts an abandoned transaction as a win in the HSR Annual Report even though the parties to the transaction never made an HSR filing—a practice that has apparently been used for many years by the Commission. But by extending the HSR Annual Reports’ universe of transactions to mergers that do not have an HSR filing, the Commission uses the HSR Annual Reports as a vehicle by which to take credit for abandoned mergers despite the transaction having no relationship to the operation of the HSR Act. Consequently, the reported figures in the HSR Annual Reports have likely been inflated beyond what an unsuspecting reader would expect—*i.e.*, a reader of an HSR Annual Report would expect to be reading about *only* transactions for which an HSR filing had been made.<sup>3</sup>

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<sup>1</sup> Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 102, 136 Stat. 5968-69 (2023). Originally the Annual HSR Reports were provided under subsection (j) of the HSR Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201(j), 90 Stat. 1394 (1976), but that provision terminated in 2000, Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 3003, 109 Stat. 734-36 (1995); H.R. Doc. No. 103-7 at 172.

<sup>2</sup> *Id.* at § 102(c); Letter from Lina Khan, Chair, Fed. Trade Comm’n, to Jim Jordan, Chairman, Committee on the Judiciary, U.S. House of Representatives, et al. (Jul. 1, 2024).

<sup>3</sup> The HSR Annual Reports have contained a disclaimer footnote for many years that says something like the following:

The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be

The HSR Annual Reports—including this year’s report—historically have tabulated top-line numbers reflecting, for example, the number of “abandonments” in a given fiscal year.<sup>4</sup> But how does the Commission define an abandonment? The HSR Annual Reports themselves have never provided an adequate definition. They merely report on transactions that were “abandoned or restructured as a result of antitrust concerns raised during the investigation.”<sup>5</sup> The reports do not define “abandoned,” “restructured,” “result,” “concerns,” or “investigation.” Each of these terms are subject to a variety of interpretations. Because the Commission operates without a specified definition, it prevents consistent treatment of the tabulated numbers across administrations and invites gamesmanship in a Congressionally mandated report.

To be sure, it is not necessarily improper for the Commission to provide additional