


2023 Merger Guidelines Continue in Effect

A photograph of a modern building's curved glass facade, showing multiple floors with large windows, set against a light blue sky.

2 MIN READ

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By: Monica Smith

What You Need to Know

- FTC Chairman Ferguson announces that the Biden/Khan/Kanter FTC/DOJ 2023 Merger Guidelines will continue to be used
- Although the Biden/Khan/Kanter Guidelines remain in effect, changes in enforcement decisions and more openness to remedies are still likely

In somewhat of a surprise, FTC Chairman Ferguson announced yesterday that the FTC and Department of Justice's joint 2023 Merger Guidelines "are in effect and are the framework for this agency's merger-review analysis." This announcement, explained in part by a desire to offer stability and predictability to merging parties, means that the FTC Staff will use the 2023 Merger Guidelines as their investigative roadmap.

Chairman Ferguson's memo, arriving as staff begin wading through the influx of merger notifications filed last week prior to the implementation of the new notification regime, touts the benefits of stability and predictability for businesses, as well as courts that may use the Guidelines to inform their merger analysis. Chairman Ferguson highlights the history of prior iterations of joint merger guidelines, concluding that "[s]tability across administrations of both parties has thus been the name of the game," and that this history instructs that "we should

prize stability and disfavor wholesale rescission” — a sentiment Chairman Ferguson also previously expressed as FTC Commissioner.

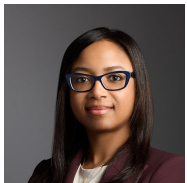
As described in our January 2024 Insight, the 2023 Merger Guidelines were a wholesale revision of prior guidelines, addressing not only horizontal mergers, but also non-horizontal transactions and a wide range of theories of harm, including some novel ones. Chairman Ferguson’s recent criticism of the Biden FTC’s rush to implement certain actions and policy measures prior to the change in administration (see our earlier Antitrust Insight) suggested a possible pullback from the 2023 Merger Guidelines, but that did not happen.

Interestingly, Chairman Ferguson describes the 2023 Merger Guidelines as “[b]y and large” a “restatement of prior iterations of the guidelines, and a reflection of what can be found in case law.” That has not been a widely held view among practitioners. Rather, most practitioners — both supporters and critics — viewed the 2023 Merger Guidelines as a substantial departure from past versions. The 2023 Merger Guidelines rely much more heavily on structural presumptions and skepticism of efficiencies, and express severe doubts about markets correcting for lost competition through entry and repositioning.

Despite emphasizing stability and predictability across administrations, Chairman Ferguson’s statement does not suggest the 2023 Merger Guidelines will remain static. He acknowledges that “[n]o guidelines are perfect,” and suggests that future changes may be considered through an “iterative and transparent revision process” that “promotes the stability that the guidelines need to succeed.” For now, businesses should assess potential transactions using the framework provided by the 2023 Merger Guidelines and traditional theories, and expect that any changes will likely be incremental and implemented in a measured way.



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