

Memorandum



Subject: Use of the 2023 Merger Guidelines

Date: February 18, 2025

To: Antitrust Division Staff

From: Omeed Assefi
Acting Assistant Attorney General
Antitrust Division

A handwritten signature in blue ink is located to the right of the "From:" field. The signature is stylized and appears to be "Omeed Assefi".

In December 2023, the Antitrust Division and the Federal Trade Commission jointly issued the 2023 Merger Guidelines. These Guidelines reflect the culmination of an extensive process by the Agencies – with substantial public engagement – to explain the procedures and enforcement practices we most often use to investigate whether mergers violate the antitrust laws.

Recent public commentary has raised the question of whether the Antitrust Division will abandon use of the 2023 Merger Guidelines. Indeed, Assistant Attorney General nominee Gail Slater was asked about the Guidelines as part of her confirmation process. Ms. Slater’s written answers make clear that – should she be confirmed – the Antitrust Division plans to continue using the 2023 Merger Guidelines. In response to questions on her specific approach to merger review, Ms. Slater answered that she will “follow the legal and economic framework described in the 2023 Merger Guidelines.”

Ms. Slater elaborated on her rationale for continued use of the guidelines in her answer:

[FTC] Chairman [Andrew] Ferguson has explained that the Merger Guidelines work best when there is stability across administrations, though he has also indicated that there may be some aspects he would be open to reforming. He further explained that much of what is in the current merger guidelines simply restates longstanding law.¹ I agree with him. It is critical to the Antitrust Division’s law enforcement mission that its guidelines reflect the original meaning of the applicable statutory text as interpreted by the binding rules of the courts. The merger guidelines have been revised periodically when time and experience suggest changes are necessary, but when revisions are undertaken a careful and transparent process should be used to ensure our guidelines maintain the stability needed for rules of the road to serve their purpose.²

As Acting Assistant Attorney General for the Antitrust Division, I wholeheartedly agree with Ms. Slater and Chairman Ferguson on these points. The Antitrust Division will continue to use the 2023 Merger Guidelines until further notice.

¹ See Flavia Fortes, Merger Guidelines Shouldn’t be Rescinded, But Could Be Reformed, FTC Commissioner Ferguson Says, Mlex, June 13, 2024.

² Abigail Slater, Responses to Written Questions of Senator Peter Welch for Hearing on “Nominations,” submitted February 17, 2025 (emphasis added).

This approach is consistent with the iterative, bipartisan approach to revisions that has long defined the Agencies' approach to merger guidelines. The original guidelines were first issued in the Johnson Administration in 1968 and maintained through the Nixon, Ford, and Carter Administrations. They remained in force until the Reagan Administration's release of the carefully-developed 1982 Merger Guidelines, which – with modest revisions – remained in force for ten years until the George H.W. Bush Administration revised them in 1992. The Clinton Administration's Antitrust Division used the 1992 Merger Guidelines until it made minor modifications in 1997, and the George W. Bush Administration continued to rely on them throughout both terms. The Obama Administration revised the guidelines in 2010, which the first Trump Administration relied on for the entire term, as supplemented by the 2020 Vertical Merger Guidelines. The 2023 Merger Guidelines built on these prior iterations.

The 2023 Merger Guidelines are not necessarily perfect. Indeed, there may be opportunities for revisions in the future. Any potential revisions, however, will be completed with the same transparency and careful thought that have become hallmarks of the merger guidelines since their inception. Until then – and consistent with applicable law – the Antitrust Division will continue use of the 2023 Merger Guidelines.