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Kirkland Alert

## Final Merger Guidelines Reinforce DOJ and FTC's Aggressive Approach Toward Antitrust Enforcement

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### Key Takeaways

- On December 18, 2023, the Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) (collectively, Agencies) jointly issued Final Merger Guidelines, which are the final version of the Draft Merger Guidelines the Agencies issued in July 2023 (see our previous [Alert](#)).
- The Final Merger Guidelines are consistent with the Agencies' aggressive public statements and enforcement approach during the past two years of the Biden Administration. Although they adopt a more measured approach than the Draft Merger Guidelines, they mark a significant departure from the Agencies' previous horizontal and vertical merger guidelines.
- The Final Merger Guidelines are not binding on courts, and it remains to be seen whether courts will deem them persuasive. Courts have accepted prior versions of the guidelines as persuasive authority. It will be a years-long process for courts to hear relevant cases and consider whether to give weight to the aggressive positions in the Final Merger Guidelines.
- The Final Merger Guidelines contain novel enforcement theories that extend beyond well-established antitrust principles. The Agencies have had limited success in their efforts thus far to test these theories in court.
- Consistent with the Agencies' recent practice, transactions raising substantive antitrust questions are likely to draw heightened scrutiny during the merger review process.

### Summary of Key Provisions

The Final Merger Guidelines represent a dramatic overhaul from the Agencies' previous horizontal and vertical merger guidelines. These changes bring the Agencies' stated priorities in line with their aggressive approach and pursuit of novel enforcement theories during the Biden Administration.

As we summarized in our [Alert](#) on the Draft Merger Guidelines, several key provisions include:

- *Lower Thresholds*: The Final Merger Guidelines lower the thresholds that the Agencies suggest will trigger a presumption of anticompetitive harm. Most importantly, according to the Agencies, a horizontal merger that creates a firm with market share greater than 30% is presumed to be anticompetitive if it also generates an increase in the Herfindahl-Hirschman Index (HHI) of more than 100 points.
- *Private Equity*: Of note for private equity firms, the Final Merger Guidelines emphasize that the Agencies will examine whether there is a “trend toward consolidation”<sup>1</sup> in an industry and whether a merger is part of a firm’s “pattern or strategy of multiple acquisitions in the same or related business lines.”<sup>2</sup> The Final Merger Guidelines also focus on partial ownership and whether such ownership would enable the acquirer to “influence the competitive conduct of the target firm,” “reduce the incentive of the acquiring firm to compete,” or “[give] the acquiring firm access to non-public, competitively sensitive information from the target firm.”<sup>3</sup>
- *Potential Competition*: The Final Merger Guidelines signal greater scrutiny of mergers involving potential (or nascent) competitors. If an industry under review is already concentrated, and an existing competitor proposes to acquire a nascent competitor, then the Agencies will not hesitate to challenge that transaction. Similarly, the Final Merger Guidelines state that merging parties face a higher bar to show that likelihood of entry by a potential competitor will rebut a presumption of anticompetitive harm between two current competitors.
- *Labor Markets*: The Final Merger Guidelines place attention on the effects that a merger between competing buyers may have on competition for inputs, with a particular focus on labor.

## Changes from the Draft Merger Guidelines

The Final Merger Guidelines reflect some moderate changes compared to the Draft Merger Guidelines. Most notably:

- *Dominant Position*: The Final Merger Guidelines no longer include a presumption that a firm with market share of 30% or greater has a “dominant position” for purposes of determining whether a merger will entrench that firm’s position. Instead, the Agencies will “assess whether one of the merging firms has a dominant position based on direct evidence or market shares showing durable market power.”<sup>4</sup>
- *Vertical Mergers*: The Final Merger Guidelines include a presumption against vertical mergers in which market share is 50% or greater in the “related product” (i.e., the product to which the combined firm could theoretically foreclose its rivals’ access). Unlike the Draft Merger Guidelines, however, that presumption has been relegated to a footnote, and the Agencies state that they will largely examine the structure of the related market on a qualitative basis.<sup>5</sup> This is an area in which the Final Merger Guidelines clearly depart from the case law, which does not afford the Agencies a concentration-based presumption in vertical mergers.<sup>6</sup>
- *Serial Acquisitions*: The Final Merger Guidelines no longer include a statement that a series of acquisitions may violate the law “even if no single acquisition on its own would risk substantially lessening competition.”<sup>7</sup> Nonetheless, the Agencies will still consider a trend toward consolidation as “an important factor in understanding the risks to competition presented by a merger.”<sup>8</sup>
- *Presumptions*: Unlike the Draft Merger Guidelines, which appeared to set out rules barring certain types of mergers altogether (e.g., “mergers should not”), the Final Merger Guidelines use softer language (e.g., “mergers can violate the law”) and make clear that the Agencies’ *prima facie* case may be rebutted by the parties’ evidence.

## Impact

The overall effect of the Final Merger Guidelines is to memorialize the enforcement framework employed by the Agencies during the Biden Administration. Prospective merging parties should expect heightened scrutiny of all transactions that raise substantive antitrust questions.

Of course, the Final Merger Guidelines are not binding on courts, and it remains to be seen whether courts will deem them persuasive. Novel theories pursued in litigation by the Agencies during the first two years of the Biden Administration have largely been met by skepticism from courts, which have relied on well-established antitrust principles rather than current enforcement priorities.

The Final Merger Guidelines were approved 3-0 by the three Democratic Commissioners of the FTC, which currently does not have any Republican Commissioners. Previous versions of the merger guidelines all enjoyed bipartisan

support, which seemed to lend additional credibility to their intellectual underpinnings and provided for longevity between political shifts in the White House. It remains to be seen whether the Final Merger Guidelines would survive a change in Presidential administration.

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1. Final Merger Guidelines at § 2.7. [↔](#)

2. *Id.* at § 2.8. [↔](#)

3. *Id.* at § 2.11. [↔](#)

4. *Id.* at § 2.6. [↔](#)

5. *Id.* at § 2.5.A.2. [↔](#)

6. *See, e.g.,* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019). [↔](#)

7. Draft Merger Guidelines at § 9. [↔](#)

8. Final Merger Guidelines at § 1. [↔](#)

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### Practices

- Antitrust & Competition

## Suggested Reading

- 21 July 2023 Kirkland Alert Draft DOJ and FTC Merger Guidelines Signal Continued Aggressive Antitrust Enforcement

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