



February 26, 2020

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: U.S. Department of Justice and the Federal Trade Commission; Draft Vertical Merger Guidelines;  
Released for Public Comment on January 10, 2020

Dear Assistant Attorney General Delrahim, Chairman Simons and Members of the Commission:

On behalf of the nearly 200,000 family farmer, rancher and rural members of National Farmers Union (NFU), I am pleased to submit comments regarding the draft Vertical Merger Guidelines, originally released for public comment on January 10, 2020.

NFU's grassroots, member driven policy highlights that "Inadequate market competition is one of the most pressing issues facing [farmers and ranchers] across the country." Additionally, NFU's policy states that there has been an "increasing trend toward horizontal and vertical concentration in the agriculture and food sectors" and "independent producers cannot succeed in the absence of protection from unfair, anti-competitive practices."<sup>1</sup>

Thus, we appreciate that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have issued draft vertical merger guidelines seeking to address how the Agencies will review vertical mergers and evaluate whether such mergers violate antitrust law. It is widely held that the 1984 Non-Horizontal Merger Guidelines are outdated and need to be replaced. However, NFU has reservations about the new proposed guidelines.

Vertical integration, whether by merger, contract, or some other means, is a major concern in American agriculture and in the food industry for both farmers and consumers.<sup>2 3</sup> Vertical integration is common in livestock, especially in the poultry and pork industries, and increasingly in dairy. It is also common in traits,

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<sup>1</sup> National Farmers Union, *Policy of the National Farmers Union*, March 2019.

<sup>2</sup> Claire Kelloway and Sarah Miller, "Food and Power: Addressing Monopolization in America's Food System," *Open Markets Institute*, March 2019. [https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322\\_MonopolyFoodReport-v7.pdf](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf)

<sup>3</sup> Zoe Willingham and Andy Green, "A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America," *Center for American Progress*, May 7, 2019.

<https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/>

seeds, and agricultural chemicals.<sup>4 5</sup> More recently, grocery retailers have been creating their own supply chains for certain agricultural products, such as fluid milk<sup>6</sup> and beef.<sup>7</sup> This vertical integration in many cases is driven by the ability to exclude marginal competitors and exploit upstream suppliers or downstream customers, rather than producing genuine improvement in the production or distribution of goods and services.

The draft guidelines are inadequately concerned with the competitive problems outlined above in the agriculture and food sectors. The starkest example in the guidelines is the explanation that “The Agencies are unlikely to challenge a vertical merger where the parties to the merger have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 percent of the relevant market.” While the draft guidelines point out that there may be some circumstances where mergers below the 20 percent threshold may suggest competitive concerns, it is nevertheless worrisome that the 20 percent threshold is offered without clear justification or evidence supporting that choice of threshold.

Regardless of whether mergers fall above or below the seemingly arbitrary 20 percent dividing line, the proposed guidelines provide criteria to the Agencies that are too subjective for determining likely competitive harms from merging firms. A more concrete presumption of illegality for any merger involving significant transformation of the market with upstream or downstream concentration would be preferable. Such an approach would be clear and easily enforceable. The merging parties should bear the burden of providing strongly persuasive proof to justify a proposed merger.

NFU’s members rely on competitive markets for their livelihoods. Vertical integration has harmed America’s farmers and ranchers and public policy should be reformed to address this. The draft guidelines are helpful in that they explicitly recognize the potentially damaging effects of vertical mergers. But policy regarding vertical integration should be more robust and effective than what is proposed in the draft guidelines.

Thank you again for the opportunity to submit comments. If you have any questions or would like to further discuss NFU’s position, please contact Aaron Shier, NFU’s Government Relations Representative, via e-mail at [ashier@nfudc.org](mailto:ashier@nfudc.org) or by phone at 202-554-1600. Thank you for your consideration.

Sincerely,



Roger Johnson  
President

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<sup>4</sup> National Farmers Union, “NFU Condemns DOJ Approval of Monsanto Acquisition by Bayer,” May 2018. <https://nfu.org/2018/05/29/nfu-condemns-doj-approval-of-monsanto-acquisition-by-bayer-2/>

<sup>5</sup> American Antitrust Institute, “AAI Says Monsanto-Bayer Merger is Too Big to Fix – Enforcers Should Reject Proposed Remedies and ‘Just Say No’,” February 8, 2018. <https://www.antitrustinstitute.org/work-product/aai-says-monsanto-bayer-merger-is-too-big-to-fix-enforcers-should-reject-proposed-remedies-and-just-say-no/>

<sup>6</sup> Heather Haddon and Benjamin Parkin, “Retailers are bottling their own milk, raising pressure on dairy companies,” *The Wall Street Journal*, October 13, 2017.

<sup>7</sup> Rhiannon Branch, “Walmart opens beef packing facility, creating its own supply chain,” *Brownfield Ag News*. <https://brownfieldagnews.com/news/walmart-opens-beef-packing-facility-creating-its-own-supply-chain/>