February 26, 2020

Department of Justice
Antitrust Division
950 Pennsylvania Ave. NW
Washington, DC 20530

Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

Re: Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment

Matter Number P810034

Submitted electronically

To Whom It May Concern:

The Campaign for Family Farms and the Environment would like to offer comments on the Federal Trade Commission-Department of Justice Draft Vertical Merger Guidelines. The Campaign for Family Farms and the Environment (CFFE) is a joint effort by Dakota Rural Action, Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Institute for Agriculture and Trade Policy and Food & Water Watch. Our organizations work together as CFFE to change policies that promote consolidation in animal agriculture at the expense of independent family farms.

CFFE joined with several other groups to offer more general comments, submitted by Public Citizen, about how to improve the draft guidelines. In addition to those overarching suggestions about the approach taken in the draft guidelines, we offer this additional letter to provide some more specific concerns and needs related to mergers in the food and agriculture sector.

It is widely recognized that the food and agriculture sector is already highly concentrated. In 2010, the Department of Justice and the Department of Agriculture hosted joint workshops around the country to examine the issue of competition in agriculture markets. The resulting report summarizing those workshops states:

> "Producers across commodities and geography identified market concentration—a term describing a situation where only a few firms compete in a market—as a concern. A consistent complaint was that, at various stages of the food chain, there are only a handful (if that many) of buyers or sellers, resulting

> in a lack of options for producers and lower prices for their commodities or higher prices for supplies."[1]

Market conditions for our farmer members have not improved since this report was released in 2012, and in fact several very large mergers in agriculture inputs, processing and retailing have made things worse.[2]

The issue of consolidation in agriculture markets is at the center of most of the challenges our members face as they struggle to maintain economically viable farming operations. The consolidation in agriculture has also not escaped the attention of Congress, and a bill to institute a moratorium on mergers between large companies in the agribusiness or food sectors until antitrust policies can be updated has been introduced for the last two sessions of Congress.[3]

We urge you to reevaluate the narrow focus of the draft guidelines and to weigh more factors when evaluating potential vertical mergers or the creation of vertical integration through means other than mergers, such as contracts, which are an enormously important factor in the consolidation of agriculture markets. The impact of consolidation in food and agriculture markets should not be evaluated using only the isolated metrics of impact on consumer price or hypothetical efficiencies for the merging firms.

Our members experience the impacts of consolidation in many ways beyond the price paid at various points in the supply chain. The radical decrease in the number of farm operations producing crops and livestock (as operations have dramatically increased in size) have done tremendous damage that often is not acknowledged by regulators assessing antitrust impacts. There are also other factors that should be weighed, including the higher risk of widespread foodborne illness outbreaks as processing steps in the food chain become more consolidated, producing more food in a smaller number of extremely large facilities. This means that problems with sanitation or contamination in a single facility can now create nationwide recalls and illness outbreaks. Additionally, a more consolidated food system is a less resilient system that cannot easily respond to disruptions, such as a fire at a large processing plant that takes production offline and disrupts upstream producers who have few (or no) other options for marketing their product.[4] These impacts should be also considered when mergers are reviewed.

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[1] U.S. Department of Justice. "COMPETITION AND AGRICULTURE: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward." May 2012, Available at https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf. Pg.5.

[2] Patrick Woodall and Tyler L. Shannon. "Monopoly Power Corrodes Choice and Resiliency in the Food System." *The Antitrust Bulletin*. April 26, 2018.

[3] HR 2933/S 1596. Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019.

[4] Jonathan Shorman. "After crippling Tyson plant fire, Kansas cattle industry faces 'logistics nightmare'." The Wichita Eagle. August 14, 2019.

When fewer farms produce more food, the environment, public health, and rural communities suffer, in addition to individual farm families who struggle to access markets that are competitive enough to pay a fair price. An analysis by Food & Water Watch and the University of Tennessee Agricultural Policy Analysis Center found that as the hog industry consolidated (and started to function more like the vertically integrated chicken industry) over three decades in Iowa, the counties that sold the most hogs and had the largest farms had declining county-wide incomes, slower growth in median household income and declining numbers of local businesses compared to the statewide average.[5] If antitrust regulation continues to be so narrowly focused on isolated metrics that prioritize downstream players in the supply chain, the devastating impact of wealth being extracted from rural economies will continue.

We also urge you to take a more expansive view of the types of mergers that warrant scrutiny of vertical power in the supply chain. Non-horizontal mergers that result in extensive control across a large number of food categories are a major factor in the extraordinarily tight relationships between food retailers and large food processors. This tight relationship facilitates coordination and creates numerous obstacles for innovators and new entrants to get onto grocery store shelves. The approval of the merger between Kraft and Heinz may not have been a vertical merger, but the ability of the merged Kraft-Heinz conglomerate to tightly coordinate with large grocery retailers has the net effect of creating a tremendous amount of integration between those two steps in the supply chain, at the expense of smaller players who experience serious obstacles breaking through that coordination to access store shelves.[6]

In addition to these overarching thoughts, we offer the specific suggestions for the draft guidelines.

- An important step that should be completed before finalizing these draft guidelines is to assess the impact of previously approved vertical mergers, as well as the practices non-merged companies may use, such as coordination and contracting, that have the effect of vertically integrating the supply chain.

- An analysis of past mergers should also examine whether past vertical mergers have triggered consolidation in other parts of the supply chain or between rival companies (or mergers to expand conglomerates that can develop even tighter relationships with firms in other steps in the supply chain such as retail.)[7]

- The draft guidelines presume that elimination of double marginalization is happening after vertical mergers. That assumption should be evaluated for past vertical mergers. In addition, if double marginalization is actually occurring, an analysis should be done to see what other effects the elimination of an upstream margin had on wages for workers

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[5] Food & Water Watch. "The Economic Cost of Food Monopolies." November, 2012. Available at https://www.foodandwaterwatch.org/sites/default/files/Food%20Monopolies%20Report%20Nov%202012.pdf Pg. 8

[6] Woodall and Shannon, Pg. 9.

[7] Woodall and Shannon, Pg. 11.

or prices for farmers. There is a currently proposed acquisition of milk processor Dean Foods by the large cooperative Dairy Farmers of America that raises this exact question, as farmers who sell milk through the coop have raised concerns about pressure to lower their milk price so the merged firm can save money on the milk it processes.[8]

- In addition, the agencies should examine the growth of private label food products, controlled through contracts or outright owned by retailers (both online and brick and mortar retailers), and the impact this has on competition in upstream markets for crops and livestock. There is currently a growing trend of large retailers creating their own supply chains, with Costco branching out into chicken production and Walmart opening a milk processing plant and establishing its own beef supply chain.[9] The continued rise of private label products controlled or owned by retailers needs to be examined in terms of obstacles created for new entrants or existing rival brands that cannot access store shelves because the retailer is promoting its private label brand. The potential for online retailers to manipulate the visibility of rivals to their private label brands should also be examined. Yet another aspect of vertical mergers that deserves special attention is the critical role of distribution in food and agriculture sectors. Beer distribution deserves a special examination as the control of distribution by large brewers has long been a source of concern for innovators like craft brewers who struggle to get distribution for their products in many states.[10]

- We also urge the regulators to consider possible adverse competitive effects beyond the outline provided in the section on Foreclosure and Raising Rival's Costs. If a processor acquires (or uses marketing or forward contracts to control) the farm level production of a crop or livestock, the adverse effects may go beyond the merged firm's ability to foreclose a rival's access at a competitive price. The ability of a firm to foreclose a rival's access to a product should also be carefully examined in light of the ability of large processors to virtually lock up the supply of critical ingredients like specific varieties of hops or aluminum cans to foreclose access by craft brewers, or specific products like certified organic ingredients that may be vital to innovative start up food companies but are in limited supply with long timeframes for building up availability.

- Another potential adverse effect that should be considered is the impact that increasing control of a supply chain through acquisition or the use of contracts has on the ability of

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[8] David Yaffe-Bellany. "A Giant Milk Industry Merger Moves Closer With a $425 Million Deal." *The New York Times*. February 17, 2020.

[9] Grant Gerlock. "Costco Builds Nebraska Supply Chain For Its $5 Rotisserie Chickens." National Public Radio. October 22, 2018; Anna-Lisa Laca. "Dozens More Farmers Lose Milk Contracts." *Dairy Herd Management*. March 5, 2018; Tom Polansek. "Walmart creates Angus beef supply chain, cutting out meat processors." *Reuters*. April 24, 2019.

[10] Diane Bartz. "Exclusive: U.S. probes allegations AB InBev seeking to curb craft beer distribution." Reuters. October 12, 2015.

upstream producers to have a mechanism for price discovery. This is a critical issue in agriculture, especially for livestock producers, who in many parts of the country no longer have open markets (in the form of auctions) that they can use to determine a fair price for their animals. The extensive use of forward contracting has so reduced the transparency of these markets that independent producers struggle to determine what their products are worth.[11] If a vertical merger (or vertical market power through other means like contracting) is being evaluated, the potential impact on upstream price discovery should be considered.

- Foreclosure of rival's ability to access data from key steps in the supply chain should also be considered. For example, as retailers (both brick and mortar stores and online platforms) run more sophisticated data collection programs, the traditional relationship between their suppliers and the retailers is changing. Access to data about shopper's habits and preferences is being credited with shifting that balance.[12] The potential for one player in a vertically integrated market to foreclose a rival's access to shopper or other data, such as inventory levels of livestock or crop harvest predictions, will need to be examined by regulators in future mergers. Additionally, data is now another commodity that is being controlled by large agribusiness firms that control key inputs like seeds, crop protection chemicals and now yield data, trapping farmers into staying with a particular company for inputs because they would lose valuable data about their own operations if they switched.

Finally, we appreciate that there will be two public workshops to discuss the draft guidelines. However, holding both of these workshops in Washington, DC means that our members or most people in rural communities will not be able to participate. We urge the regulators to schedule additional workshops outside of Washington, DC, in locations more accessible to farmers and rural communities. And we would request that there be additional time for public comment on the draft guidelines after the workshops are completed to allow for issues raised in the workshops to be considered.

Thank you for your consideration. If you have questions or need more information, please contact Patty Lovera, pattylovera20@gmail.com, (202) 526-2726.

Sincerely,

The Campaign for Family Farms and the Environment

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[11] U.S. Department of Justice. Pg. 11-12.

[12] Annie Gasparro and Jaewon Kang. "Grocers Wrest Back Control of Shelf Space." *The Wall St. Journal*, February 20, 2020.