



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 20,000 family farmer, rancher and rural members of Rocky Mountain Farmers Union (NFU), I am pleased to submit comments regarding the draft Vertical Merger Guidelines, originally released for public comment on January 10, 2020.

RMFU's grassroots, member-driven policy highlights that "We support the strengthening and enforcement of antitrust laws." Additionally, RMFU's policy states, "We oppose the vertical integration and consolidation of production and processing by industrial corporate farms through mergers and acquisitions."

Our members believe a "family farm" is an agricultural production unit using land and other capital investments and operated by one or more farm operator families who provide the management, take the economic risk, and do the work required to operate and manage the unit. A "family farm corporation" is defined as a corporation founded for farming and the ownership of agricultural land in which most of the voting stock is held by, and the majority of the stockholders are, members of a family, at least one of whom is the person managing and working on the farm.

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 It is widely held that the 1984 Non-Horizontal Merger Guidelines are outdated and need to be replaced.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, RMFU 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.^{2 3} Vertical integration is common in livestock, especially in the poultry and pork industries, and increasingly in dairy. It is also common in traits, seeds, and agricultural chemicals.^{4 5} More recently, grocery retailers have been creating their own supply chains for certain agricultural



products, such as fluid milk⁶ and beef.⁷ 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.

RMFU’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 RMFU’s position, please contact Nick Levendofsky, RMFU’s Director of External Affairs, via e-mail at nick.levendofsky@rmfu.org or by phone at 303-283-3528.

Thank you for your consideration.

Sincerely,

Dr. Dale McCall
RMFU President