NATIONAL ASSOCIATION OF
Manufacturers

Graham Owens
Director, Legal & Regulatory Policy

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U.S. Department of Justice
Antitrust Division
450 5th St NW # 8700
Washington, DC 20530

Federal Trade Commission
Bureau of Competition
400 7th St SW
Washington, DC 20024

**Re: Comments on Draft Vertical Merger Guidelines**

The National Association of Manufacturers ("NAM"), appreciates the opportunity to comment in response to the Federal Trade Commission ("FTC") and Department of Justice's ("DOJ") joint request for comment on the draft 2020 Vertical Merger Guidelines ("draft guidelines").[1] The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. It is the largest U.S. manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.82 million men and women, contributes $2.37 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

Manufacturers applaud the FTC and DOJ's ("agencies") efforts to update the U.S. vertical merger guidelines for the first time since 1984.[2] As the FTC's press release notes, "[g]reater transparency about the complex issues surrounding vertical mergers will benefit the business community, practitioners, and the courts."[3] Manufacturers agree. Clearly defined enforcement policies can help manufacturers better plan for potential vertical mergers by adding predictability about the scrutiny with which both agencies will evaluate proposed deals.[4]

As presently drafted, however, the guidelines fall short of providing true clarity to the regulated community in a few important respects. First, the agencies should acknowledge from the outset that the vast majority of vertical mergers are rooted in pro-competitive strategies,[5] and the guidelines should be designed to detect the small minority of deals where the anti-competitive effects in a distinct market far outweigh the pro-competitive justifications. Indeed,

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[1] *See* Press Release, U.S. Dep't of Justice, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020); U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Vertical Merger Guidelines (Jan. 10, 2020) [hereinafter draft guidelines].
[2] U.S. Dep't of Justice, Non-Horizontal Merger Guidelines (1984) [hereinafter 1984 Merger Guidelines].
[3] *See* Press Release, *supra* n. 1.
[4] *See* D. Daniel Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 FLA. L. REV. 1357, 1370 (2018) ("Antitrust is best served when the agencies offer clearer guidance as to…risk for vertical merger based on…economic presumptions of harm" and "different levels of risk for potential anticompetitive practices.").
[5] Such pro-competitive strategies include a company trying to streamline its operations and/or logistics, trying to get certainty in supply or distribution channels, among others.

outside of double marginalization elimination, the draft guidelines fail to make clear to what extent the agencies may consider pro-competitive effects at the enforcement threshold—if at all. This lack of clarity will likely lead industry and courts to assume an inference against vertical mergers, to the detriment of open and efficient markets. Second, the draft guidance contains a notional safe harbor threshold that deviates from settled law and the global norm in a way that is likely to create confusion, complicate the analysis of deals with impacts in both domestic and foreign markets, and ultimately harm the competitiveness of U.S. firms globally.[6] Finally, the guidance fails to address some of the more mundane, yet essential, discrepancies between the agencies' antitrust enforcement approaches, such as the way in which each agency seeks injunctions. Without addressing these key concerns, the agencies risk injecting greater policy uncertainty into regulatory matters that, until just recently, have been relatively stable.

## 1. Both Agencies Should Reaffirm a Merger Review Policy that Recognizes Vertical Mergers Are Generally Pro-competitive and Based on the Economically Grounded Consumer Harm Standard

Review of both horizontal and vertical mergers is generally grounded in the economics-based consumer harm standard, which rejects any blanket presumption that business combinations above a certain deal size are anti-competitive without further consideration of market concentration and impacts to consumers.[7] Courts and antitrust scholars have consistently found that each type of combination presents different legal, economic, and policy considerations for regulators.[8]

Measured against the consumer harm standard, vertical mergers are generally pro-competitive.[9] Indeed, the Acting Director of the FTC Bureau of Competition noted in 2018 that "empirical work has tended to show that vertical mergers (and vertical restraints) are typically procompetitive. For example, in a review of multiple studies of vertical mergers and restraints, economists found only one example where vertical integration harmed consumers, and multiple examples where vertical integration unambiguously benefited consumers."[10] As a result, neither agency challenged a vertical merger in court for roughly four decades until 2018.[11] Indeed, even in DOJ's 2018 challenge to a vertical merger, the agency conceded the fact that the deal, "like most vertical mergers, will result in significant benefits to customers."[12] Both the trial and

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[6] *See, e.g.,* Noah J. Phillips, Comm'r, Fed. Trade Comm'n, Looking Back to the Future: What the Past Can Tell Us About the Future of Antitrust, Address Before the Technology Policy Institute 2 (Nov. 18, 2018) ("We want U.S. firms to be competitive, especially in the face of global commerce. And I fear that U.S. competitiveness—often expressed in scaled firms or innovative and creative destruction—is now being offered up as a sacrifice to the regime described by the Supreme Court in *Von's Grocery* as one in which "the government always wins") (citing *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966).
[7] *See* Anant Raut, *On Nascent Competition in Merger Analysis* at 1 (2019).
[8] *See, e.g., United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) ("[U]nlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share.") (citing 1984 Merger Guidelines § 4.0 (June 14, 1984)).
[9] *Id.*
[10] D. Bruce Hoffman, Acting Dir., Fed. Trade Comm'n Bureau of Competition, Vertical Merger Enforcement at the FTC, Address Before the Credit Suisse 2018 Washington Perspectives Conference (Jan. 10, 2018) (citations omitted).
[11] *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018), *aff'd sub nom, United States v. AT&T, Inc.,* 916 F.3d 1029 (D.C. Cir. 2019).
[12] *Id.*

appellate courts in that case ultimately found that the DOJ had further failed to establish that the deal "was likely to substantially lessen competition."[13]

Prior to this quiet period, the agencies did challenge several deals on the basis that they may lead to one of two specific types of economic harm. Courts have found that vertical mergers may be anti-competitive where they enable the merged firm to withhold essential inputs from competitors or to foreclose competitors from a substantial portion of potential customers.[14] These cases, however, were very fact specific and based on relatively uncontested market definitions, which may not be the case generally, and as such were the exception to courts' general rule of favoring vertical deals because of their generally pro-competitive effects. Manufacturers agree that oversight is important to guard against the rare and isolated cases where vertical deals lead to truly anticompetitive outcomes, and Congress clearly intended to provide that oversight through Section 7 of the Clayton Act.[15]

There are myriad good faith reasons why manufacturers choose to vertically merge, and these mergers lead to important benefits for consumers and manufacturers alike. Vertical mergers often drive innovation, lower transactional costs, and reduce supply chain costs, including the overhead costs of production or distribution.[16] These outcomes lower consumer prices in several ways. For example, as the agencies recognize, eliminating "double marginalization" can lower prices for consumers by stripping out needless overhead, and this benefit can extend beyond the "relevant market" that the agencies might identify for scrutiny.[17] This is merely one economic avenue through which vertical mergers can benefit consumers. The agencies should also recognize in the guidelines other benefits that accrue through vertical alignment, such as the principle of asset specificity, where "[t]he more specific the asset is, the better the result from vertical integration,"[18] and the ability to anticipate and avoid supply chain disruption.

Vertical mergers also provide economic "exit" opportunities for small and medium-sized firms that may help justify initial investments into expensive capital equipment or innovative new technology. Indeed, as antitrust law scholars have recently pointed out, "a change of policy [against vertical mergers] may dampen entrepreneurial investment and innovation" at the so-

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[13] *Id.*

[14] *See, e.g., Brown Shoe v. United States*, 370 U.S. 294, 323-24 (1962) ("The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors…from a segment of the market otherwise open to them, the arrangement may act as a clog on competition."); *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 360 (2d. Cir. 1979) (upholding vertical merger absent evidence that it "deprives rivals from major channels of distribution…[or] excludes them from the market altogether") (footnote omitted); *Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co.,* 826 F.2d 1235, 1246 (3d Cir. 1987) (affirming dismissal of challenge to vertical merger absent evidence that it "precluded the plaintiff from selling any of its products").

[15] *See Hearing on A Study of Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong.* (1956) (citing H.R. Rep. No. 2287 (1936)) (Discussing Robinson-Patman Act's amendments to §7 of the Clayton Act where Congress noted "It is the design and intent of this bill to strengthen existing anti-trust laws, prevent unfair price discriminations, and preserve competition in Interstate commerce").

[16] Sokol*, Vertical Mergers, supra* n. 4, at 1357 (citing Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 720 (2017)).

[17] *See* draft guidelines, *supra* n. 1, at 7.

[18] Sokol, *Vertical Mergers*, *supra* n. 4, at 1366 (citing Martin K. Perry, *Vertical Integration: Determinants and Effects*, in Handbook of Industrial Organization 188, 213-14 (Schmallensee & Willig eds., 1989)).

called “seed stage” of firm formation by limiting founders’ and investors’ opportunities to seek a profitable exit.[19] As a result, any apparent change in inference is likely to chill investment in small and medium-sized manufacturers.[20]

The consumer welfare standard continues to drive market efficiencies, public benefits, and more predictable antitrust enforcement to this day. Manufacturers urge the agencies to make clear that, based on the consumer welfare standard, they still recognize vertical deals as generally pro-competitive.

**2. The Agencies Should Harmonize Safe Harbor Provisions with Settled Case Law, Empirical Economic Evidence, and Those of Other Markets such as Europe**

As commerce has become increasingly globalized over the past several decades, manufacturers must now often clear proposed mergers with multiple competition regulatory bodies globally. The draft guidelines propose a “market share” safe harbor of 20 percent, which the agencies state is not a “rigid screen” or a strict barrier to enforcement. This safe harbor is notably lower than corresponding safe harbors in other developed markets, often 30 percent, and the draft guidance provides essentially no background information or economic data to show why the agencies chose to use this lower threshold for the domestic market.[21]

Manufacturers worry that a 20 percent threshold will raise an untenable presumption of scrutiny for the majority of vertical combinations, despite a lack of clear economic justification for such automatic scrutiny. Ultimately, the agencies should revise the market percentage threshold to better align with global economic realities or provide in the guidelines a clear basis grounded in empirical data to justify any threshold the agencies choose. To the extent that the proposed safe harbor threshold deviates from settled law and the global norm, the agencies should provide an especially compelling basis for that deviation. Further, the agencies should also explain if and how their analysis will differ with respect to evaluating vertical arrangements other than mergers and acquisitions.[22]

**3. The Final Guidance Should Harmonize Discrepancies in Merger Review Policies Between Agencies as Identified by Antitrust Modernization Commission**

In 2002, Congress established “an Antitrust Modernization Commission to study and report to Congress and the President on issues relating to the modernization of the antitrust laws.”[23] Among other findings, the Commission raised concerns with the fact that, although both the FTC and DOJ have essentially identical authority to conduct merger reviews and to seek injunctions in federal court to prevent the consummation of mergers they believe may substantially lessen competition, “their practices with respect to seeking permanent injunctions differ.”[24] Specifically, the DOJ typically agrees to combine proceedings for both a preliminary

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[19] *Id*.
[20] *Id*. at 1362.
[21] *See, e.g.,* 2008 O.J. (C 265) 9 (noting that the European Commission is unlikely to find concern in non-horizontal mergers where post-merger market share is below 30 percent); Regulation 5(3)(b) of the Indian Merger Regulations (noting that if the combined market share of merging firms is less than 25 percent the merger is appraised to not have an appreciable adverse effect on competition).
[22] *See Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2,7 (1984) (noting a market share of 30 percent was insufficient for vertical deal to have anything more than minimal impact on commerce).
[23] Antitrust Modernization Comm’n Act, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).
[24] ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, 138 (2007).

and permanent injunction before a district court, but the FTC typically only seeks preliminary injunctions despite having the statutory authority to consolidate proceedings like the DOJ.[25] The Commission noted that these differences have led knowledgeable practitioners and companies to believe that "companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ."[26]

A proposed merger, regardless of type, should not succeed solely on the basis of which agency reviews it, particularly when losing a preliminary injunction hearing is typically fatal to any proposed deal.[27] To ensure that both agencies minimize the divergence in merger review policy—to the detriment of public confidence in antitrust enforcement—the agencies should affirm a consistent policy in any final guidelines. Specifically, the FTC should adopt a policy that when it seeks injunctive relief to block a merger in federal court, it will simultaneously seek permanent injunctive relief, as well as seek to consolidate those proceedings so long as it is able to reach agreement on appropriate scheduling order with the merging parties.

We appreciate the opportunity to provide these comments, and we encourage you to contact us should you wish to discuss any part of this submission.

Sincerely,

**Graham Owens**
Director, Legal and Regulatory Policy
National Association of Manufacturers

[25] *Id*.
[26] *Id*. at 131, 138.
[27] *Id*. at 138 (citing Michael Sohn, Statement at AMC Federal Enforcement Institutions Hearing 7-11 (Nov. 3, 2005) (recognizing "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" regarding a transaction); Joe Sims, Statement at AMC Federal Enforcement Institutions Hearing 7 (Nov. 3, 2005) ("[T]he entry of a preliminary injunction is fatal to the deal")).