"Agencies") need certain revisions to achieve the stated goals. The purpose of the Proposed Guidelines is to update the analytical framework used by the FTC and DOJ to evaluate the competitive effects of vertical mergers. However, the Proposed Guidelines do not provide much detail to guide meaningfully businesses, practitioners, or courts.

The Proposed Guidelines are the first update of the analysis the Agencies apply to vertical mergers put forth in nearly four decades, and we commend this effort. However, as such, the Agencies should not miss the opportunity to provide greater clarity on the likely procompetitive benefits of vertical transactions, the analytical framework used to evaluate such combinations, and achieve consistency with other merger regimes outside the United States, while taking into consideration the impact of the "soft" 20 percent threshold set in the Proposed Guidelines could have on enforcement.

For example, the Agencies have long recognized that most vertical mergers are inherently procompetitive. In fact, the FTC's Director of the Bureau of Competition recently affirmed that "overall there is a broad consensus in competition policy and economic theory that the majority of vertical mergers are beneficial because they reduce costs and increase the intensity of interbrand competition."¹ More importantly, courts have routinely recognized that vertical mergers tend to be procompetitive.² We think it is important the Proposed Guidelines expressly acknowledge the procompetitive nature of most vertical transactions to set the context for the review of vertical transactions and that the analytical approach adopted is consistent with this reality.

While the Proposed Guidelines address the benefit of eliminating double marginalization, they fall short in providing explicit examples of other vertical merger specific efficiencies the Agencies recognize based on their "new economic understandings." For example, the Agencies' joint Horizontal Merger Guidelines³ note that the Agencies:

have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce

¹ D. Bruce Hoffman, Dir., Bureau of Competition, Fed. Trade Comm'n, Vertical Merger Enforcement at the FTC, Remarks Before the Credit Suisse 2018 Washington Perspectives Conference 8 (Jan. 10, 2018).

² See United States v. AT & T Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018), aff d sub nom. United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) ("Vertical mergers often generate efficiencies and other procompetitive effects."); Nat l Fuel Gas Supply Corp. v. F.E.R.C., 468 F.3d 831, 840 (D.C. Cir. 2006) ("We began by emphasizing that vertical integration creates efficiencies for consumers.); Tenneco Gas v. FERC, 969 F.2d 1187, 1197 (D.C.Cir.1992) ("In a competitive market, the efficiencies of the pipeline-affiliate relationship should produce benefits for consumers."); see also Comcast Cable Comms., LLC v. FCC, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("

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February 26, 2020

the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

The Proposed Guidelines fail to outline, even at a high-level, the Agencies' "new economic understandings."

The Proposed Guidelines should provide insight into the types of evidence the Agencies will find sufficient to support efficiency arguments. The Proposed Guidelines should also examine recent vertical transactions, acting as natural experiments, to explore what the Agencies have learned about efficiencies in vertical mergers. Such examinations have often been part of any guidance issued by the Agencies. If the Proposed Guidelines delineate other types of persuasive efficiencies, beyond eliminating double marginalization, merging parties, attorneys, and economists can be better prepared to engage in more fruitful discussions earlier in the merger review process. Likewise, such guidance would help courts better understand how the Agencies consider economic arguments regarding efficiencies.

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