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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 Request for Comments on the Draft Vertical Merger Guidelines. 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's efforts to update the U.S. vertical merger guidelines for the first time since 1984. As the FTC press release notes,

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 ² 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 Second, the draft guidance contains a notional safe harbor threshold that deviates from settled law and the global norm in a way that is likely to create confusion, complicate the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 D J H Q F L H V ¶ D Q W L W a p p r o a c h e s , s u d r a s t i e h v a i o w i c h e a c h a g e n c y s e e k s i n j u n c t i o n s . W i t h o u t a d d r e s s i n g t h e s e k e y c o n c e r n s , t h e a g e n c i e s r i s k i n j e c t i n g g r e a t e r p o l i c y u n c e r t a i n t y i n t o r e g u l a t o r y m a t t e r s t h a t , u n t i l j u s t r e c e n t l y , h a v e b e e n r e l a t i v e l y s t a b l e .

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 ³ H P S a l W o r k 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 H [D P S O H V Z K H U H Y H U W L F D O L Q W H J U D W L R Q ¹⁰ X s C a d e B u t , n e i t h e r a g e n c y c h a l l e n g e d a v e r t i c a l m e r g e r i n c o u r t f o r r o u g h l y f o u r d e c a d e s u n t i l 2 0 1 8 . ¹¹ I n d e e d , e v e n L Q ' 2 - ¶ V F K D O v e r t h e m e r g e r t h e a g e n c y c o n c e d e d t h e f a c t t h a t t h e d e a l , ³ O L N H m o s t v e r t i c a l m e r g e r s , w i l l r e s u l t i n s i g n i f i c a n t b e n e f i t s t o c u s t o m e r s . ¹² B o t h t h e t r i a l a n d

⁶ See, e.g., 1 R D K - 3 K L O O L S V & R P P ¶ U) H G 7 U D G H & R P P ¶ Q / R R N L Q J % D F N C a n T e l l U s A b o u t t h e F u t u r e o f A n t i t r u s t , A d d r e s s B e f o r e t h e T e c h n o l o g y P o l i c y I n s t i t u t e 2 (N o v . 1 8 , ³ : H Z D Q W 8 6 I L U P V W R E H F R P S H W L W L Y H H V S H F L D O O \ L Q W K H I D U . S . c o m p e t i t i v e n e s s ² o f t e n e x p r e s s e d i n s c a l e d f i r m s o r i n n o v a t i v e a n d c r e a t i v e d e s t r u c t i o n ² i s n o w b e i n g o f f e r e d u p a s a s a c r i f i c e t o t h e r e g i m e d e s c r i b e d b y t h e S u p r e m e C o u r t i n *Von's Grocery* a s o n e i n Z K L F K ³ W K H J R Y H U Q P H Q W U S O v *Von's Grocery Co.*, 3 8 4 U S L 2 7 0 , 3 0 1 (1 9 6 6) . ⁷ See Anant Raut, On Nascent Competition in Merger Analysis at 1 (2019). ⁸ See, e.g., *United States v. AT&T, Inc.*

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. D Q G D V V X F K Z H U H W K H H [F H S W L R C
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 may .78 Tm 0 g-4(i)rs ofime(o)1bu 11.04

FDOOHG³ VHHG VWDJH´ RI ILUP IRUPDWLRQ E\ OLPLWLQJ IRXQGH profitable exit.¹⁹ As a result, any apparent change in inference is likely to chill investment in small and medium-sized manufacturers.²⁰

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and permanent injunction before a district court, but the FTC typically only seeks preliminary injunctions