

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:

I write with the intent to elevate the united voice of nearly 19,000 family farmers and ranchers across the state of South Dakota. This group of like minded producers comprise the membership body of the South Dakota Farmers Union (SDFU), the largest agricultural organization in our state. It is with great honor we hold the opportunity to comment on issues such as the draft Vertical Merger Guidelines.

SDFU's member curated policy echos the concerns of vertical concentration impact, "We believe that monopolistic concentration in the meat packing, transportation, energy, and seed industries has reduced competition to a point where producers no longer have access to fair and equitable markets."¹

It is with the reduced ability of family-scale producers to remain competitive in today's markets in mind, that we appreciate the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issuance of draft Vertical Merger Guidelines. SDFU recognizes that these guidelines seek to address how the Agencies will review vertical mergers and evaluate whether such mergers violate antitrust law. However, SDFU has some fears about the new proposed guidelines.

Vertical integration, whether by merger, contract, or some other means, actively choke out family-scale farmers and ranchers only leaving room for monopolistic agriculture power-houses. We see this happening all too often in livestock, especially in the poultry and pork industries, and increasingly in dairy. SDFU's policy states support of "legislation to prohibit ownership or control of feedlots by meat packing firms." Additionally, it highlights opposition to "ownership of livestock by packing firms except for the reason of immediate slaughter."¹

Vertical Integration is also common in traits, seeds, and agricultural chemicals.² More recently, grocery retailers have been creating their own supply chains for certain agricultural products, such as fluid milk³ and beef.⁴

¹ South Dakota Farmers Union, *Policy of the South Dakota Farmers Union*, December 2019.

² American Antitrust Institute, "AAI Says Monsanto-Bayer Merger is Too Big to Fix – Enforcers Should Reject Proposed Remedies and 'Just Say No'," February 8, 2018. <https://www.antitrustinstitute.org/work-product/aai-says-monsanto-bayer-merger-is-too-big-to-fix-enforcers-should-reject-proposed-remedies-and-just-say-no/>

³ Heather Haddon and Benjamin Parkin, "Retailers are bottling their own milk, raising pressure on dairy companies," *The Wall Street Journal*, October 13, 2017.

⁴ Rhiannon Branch, "Walmart opens beef packing facility, creating its own supply chain," *Brownfield Ag News*. <https://brownfielddagnews.com/news/walmart-opens-beef-packing-facility-creating-its-own-supply-chain/>

This vertical integration in many cases is driven by the ability to exclude marginal competitors, family-scale producers, and exploit upstream suppliers or downstream customers, rather than producing genuine improvement in the production or distribution of goods and services.

SDFU feels the drag guidelines inadequately address the competitive problems outlined above in the agriculture and food sectors. The most concerning 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.

South Dakota family-scale producers rely wholeheartedly on competitive markets for their livelihoods. Vertical integration jeopardizes the market place for these producers and puts the well-being of rural communities at risk. I implore you to consider the above suggestions, as the future of family farmers and ranchers everywhere depend on the finalized guidelines.

On behalf of SDFU’s membership, I thank you again for the opportunity to submit these comments. If you have any questions or would like to further discuss SDFU’s position, please contact Doug Sombke, SDFU’s President, via e-mail at dsombke@sdfu.org or by phone at 605-350-4211. Thank you for your consideration.

Respectfully,

A handwritten signature in black ink that reads "Doug".

Doug Sombke
President, South Dakota Farmers Union

