United States Senate
WASHINGTON, DC 20510

June 18, 2020

The Honorable Makan Delrahim
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, D.C. 20580

Dear Assistant Attorney General Delrahim and Chairman Simons:

We write to urge the Department of Justice and the Federal Trade Commission (FTC) to resume their public consideration of new vertical merger guidelines, to release for public comment revised draft vertical merger guidelines incorporating useful insights received during the initial public comment period, and to schedule additional public workshops on the guidelines.

Our country is still in the grip of COVID-19, and that will likely be true for some time. But this in no way lessens the need to protect competition, and that includes potential threats to competition from anticompetitive vertical mergers. Although the initial effect of the pandemic was to reduce overall merger activity, many deals are still proceeding, and new mergers – such as Facebook's acquisition of Giphy – continue to be announced. Going forward, the economic chaos caused by the pandemic may lead to profound structural changes in many industries and a sharp rebound in mergers and acquisitions activity, as cash-rich companies and investors seek to acquire struggling businesses and assets at bargain prices. Many of these transactions will be vertical mergers, and inevitably, some will raise significant antitrust issues. That is why work should continue toward issuing new guidelines that reflect agency enforcement practices and current economic thinking on the competitive effects of vertical mergers, and that enable both agencies to enforce Section 7 of the Clayton Act to its fullest extent to protect competition and consumers.

We were initially encouraged that the Department and the FTC had begun a process to develop new vertical merger guidelines, as well as by the joint release of Draft Vertical

Merger Guidelines (Draft Guidelines)[1] for public comment. Although the Draft Guidelines could be substantially improved, their release was a positive first step. The outbreak of the coronavirus pandemic suspended that process, forcing the agencies to cancel the second of two public workshops scheduled to discuss the submitted comments. We write to encourage the Department and the FTC to resume this public process.

Courts will to look to any final vertical merger guidelines issued by the agencies as persuasive authority whenever they analyze a vertical merger challenge. Judges have used the 2010 Horizontal Merger Guidelines in this way, and given the relative lack of vertical merger case law, we can expect judges to rely even more heavily on final vertical merger guidelines.

Accordingly, it is critical that the final guidelines present a clear and comprehensive articulation of the agencies' approach to analyzing the potential competitive harms that may be presented by vertical mergers, as well as claims regarding potential vertical merger efficiencies, including the elimination of double marginalization. This articulation should reflect the current law and modern economic thinking on vertical integration. They should also serve as a guide for the courts to promote the positive development of the law and as a correction to those who would promote unsupported assumptions that vertical mergers are inherently or generally procompetitive. In addition, final guidelines should provide guidance on the agencies' approach to crafting negotiated remedies for anticompetitive vertical mergers.

As many of the public comments reveal, the Draft Guidelines, in certain respects, fall short of these goals. Although the Draft Guidelines are undoubtedly a substantial upgrade from the Justice Department's outdated 1984 Non-Horizontal Merger Guidelines, there are a number of areas in which the Draft Guidelines could be improved. Below are some general comments on the Draft Guidelines based on the public discussions to date:

- **The final guidelines should clearly describe potential theories of harm and identify circumstances that warrant heightened levels of scrutiny by enforcers.** The Draft Guidelines offer only very general descriptions of the theories of competitive harm that may arise from vertical mergers and embed several others within the few examples provided. There is a substantial body of scholarship describing the potential anticompetitive effects of vertical mergers.[2] These appear to be generally accepted and include theories of harm such as input foreclosure (including raising rivals' costs), customer foreclosure, raising entry barriers by requiring two-market entry, elimination of a potential market entrant, misuse of acquired competitively-sensitive information, evasion of regulation, collusive information exchange, eliminating or disadvantaging an aggressive

[1] Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines, Jan 10, 2020, https://www.ftc.gov/system/files/documents/public_statements/1561715/p810034verticalmergerguidelinesdraft.pdf.

[2] *See, e.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018); Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, (2019), Georgetown Law Faculty Publications and Other Works 2148.

disruptive competitor, and others.[3] These theories of harm may be far from evident to a generalist district court judge adjudicating a merger challenge, and there is little to no case law discussing them due to the lack of litigated vertical merger challenges over the last several decades. Accordingly, failing to articulate these and other relevant theories of harm in final vertical merger guidelines may place government enforcers at a significant disadvantage when trying to establish competitive harm in court, as judges are much more likely to be persuaded by agency guidelines than law review articles and the testimony of paid expert economists. The final guidelines should include clear descriptions of these theories of harm and the types of evidence that would support such theories.[4]

In addition, final guidelines should identify circumstances that would warrant high levels of enforcement scrutiny, and potentially, enforcement action. Commissioner Slaughter raised concerns that the Draft Guidelines indicated only that the vertical merger fact patterns presented "*may* warrant scrutiny" from the enforcement agencies. We agree with her that the mergers described in the fact patterns "*do* warrant scrutiny, and may warrant enforcement,"[5] and that the final guidelines should present further examples of vertical mergers that would merit a similar degree of scrutiny. This would make the final guidelines more useful to the business community, antitrust practitioners, and agency staff.

- **The final guidelines should not include the 20 percent market share quasi-safe harbor.** We have significant concerns about the apparent 20 percent market share "safe harbor" in the Draft Guidelines. Doubts have been raised concerning the empirical basis for the 20 percent threshold and some have questioned whether market concentration rather than market share would be a more appropriate basis for a safe harbor.[6] Although we appreciate that the Draft Guidelines mention that vertical mergers with shares below the threshold may still give rise to competitive concerns, we are concerned that the 20 percent threshold may become, in practice, a rigid screen, despite the agencies' original intentions. This risks hindering enforcers' ability to challenge mergers that fall within the screen even when they might harm competition. For that reason, we see insufficient justification for setting a "safe harbor" threshold at any specific market share. A discussion regarding the implications of low market shares or low

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[3] *See* Jonathan Jacobson, *Vertical Mergers: Is It Time to Move the Ball?,* ANTITRUST Vol. 33, No. 3 (2019).
[4] *The 2020 Vertical Merger Guidelines: A Suggested Revision*, submitted by Professor Steven C. Salop may provide a helpful framework. (https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/salop_suggested_vertical_merger_guidelines.pdf.) *See also* Baker et al., *Recommendations and Comments on the Draft Vertical Merger Guidelines* (Feb 24, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf.
[5] Statement of Com. Rebecca Kelly Slaughter, FTC-DOJ Draft Vertical Merger Guidelines, Jan. 10, 2020, https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.
[6] *See* Diana L. Moss, *Draft Vertical Merger Guidelines: Comments of the American Antitrust Institute*, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/aai_comments_draft_vm_guidelines_f.pdf.

levels of market concentration on vertical merger analysis may be more appropriate.

- **The final guidelines should include a discussion of how the agencies analyze innovation effects in the context of vertical mergers.** Vertical mergers may have significant effects on innovation, which can factor into vertical foreclosure analysis.[7] Yet the Draft Guidelines contain no discussion concerning potential harms to innovation arising from vertical mergers. As the enforcement agencies are very likely to confront transactions with vertical components in technology-intensive industries, we are concerned that the Draft Guidelines do not address innovation effects, and we urge the agencies to do so in the final guidelines.

- **The final guidelines should clarify that the merging parties always have the burden of establishing elimination of double marginalization, which should be incorporated into the Efficiencies section.** Perhaps no topic received more attention in the public comments than the treatment of elimination of double marginalization (EDM), the theory that the combination of firms in a vertical relationship may induce coordination within the merged firm to reduce the margins taken at one or both market levels, resulting in lower prices for consumers. EDM is conceptually viewed as a potential vertical merger efficiency, yet the Draft Guidelines set the topic apart in its own section, between the two competitive effects sections, rather than within the Efficiencies section. The Draft Guidelines also provide that the "agencies *generally* [emphasis added] rely on the parties to identify and demonstrate whether and how the merger eliminates double marginalization," without articulating any circumstance in which the agencies would not rely on the parties. These two features could suggest to courts that the enforcement agencies may bear the burden of rebutting EDM as part of the competitive effects analysis in their case-in-chief; it will certainly suggest to parties that they should make that argument. This risks making vertical merger enforcement even more difficult, leading to under-enforcement.

  Recent scholarship outlines the assumptions underlying EDM, explaining that those assumptions do not hold for many vertical mergers.[8] This suggests that EDM should be assessed on a case-by-case basis, not presumed, and the merging parties, which have better access to the business information needed to establish EDM, should bear the burden of persuasion. The final guidelines should clarify that the parties must *always* be required to identify and demonstrate whether and how their merger eliminates double marginalization and to show that any EDM benefits are verifiable, merger-specific, and significant enough to offset any anticompetitive harm. EDM should also be included as part of the Efficiencies section.

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[7] *See* Jon Sallet, *The Interesting Case of the Vertical Merger* (remarks as prepared for delivery) (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/938236/download.

[8] John Kwoka and Margaret Slade, *Second Thoughts on Double Marginalization*, ANTITRUST Vol. 34, No. 2 (2020), at https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/atmag-spring2020/sprng20-kwoka.pdf.

- **The final guidelines should explicitly state that vertical mergers are not, nor should they be presumed to be, inherently procompetitive.** The Draft Guidelines appropriately do not include a procompetitive presumption for vertical mergers. Although most agree that vertical integration can produce benefits for consumers and lower costs, there are some who argue that vertical mergers should benefit from a presumption of legality. Such arguments are based on a mere handful of oft-cited studies. A survey of recent studies on vertical mergers found their results to be "decidedly mixed," concluding that "taken as a whole, these studies do not provide evidence for the proposition that all or most vertical mergers are good for consumers."[9] In any event, a presumption of legality makes little sense as the government already bears both the initial burden of demonstrating probable anticompetitive effect and the ultimate burden of proof.[10]

  Last September, Chairman Simons said that, "anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical mergers are benign."[11] We agree, and we encourage the addition of an explicit statement in the final guidelines to the effect that vertical mergers are not presumptively procompetitive.

- **The final guidelines should include a discussion of the agencies' approach to vertical merger remedies.** Although the vast majority of vertical merger enforcement comes in the form of negotiated consent decrees,[12] the Draft Guidelines do not address the topic of remedies. There has been much discussion regarding the effectiveness of merger remedies, particularly behavioral remedies (like information firewalls, non-discrimination commitments, or contracts locking in pre-merger pricing), which are often employed to address anticompetitive effects arising out of vertical mergers. Some commenters have raised serious questions about whether anticompetitive vertical mergers can be cured with behavioral remedies or divestitures.[13] Guidance from the agencies on their approach to vertical merger remedies would be helpful to practitioners and businesses.

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[9] Marissa Beck and Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 2-3 (February 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/beck_scott_morton_comments_on_draft_vertical_merger_guidelines_022620.pdf.

[10] *United States. v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), *cited in United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2018). *See also* Daniel P. Culley, *Comments on Draft Vertical Merger Guidelines,* 3, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/culley_comments_on_the_vertical_merger_guidelines_final.pdf ("[i]f the Guidelines were to adopt a presumption of legality, they would be effectively raising the burden of proof.").

[11] Prepared Remarks of Joseph Simons, Fordham Speech on Hearings Output, at 8 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544082/simons_-_fordham_speech_on_hearings_output_9-13-19.pdf.

[12] *See* Steven C. Salop and Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994-April 2020*, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2541&context=facpub.

[13] *See* Nicholas Economides et al., *Comments on the DOJ/FTC Draft Vertical Merger Guidelines*, Net Institute Working Paper #20-14, 8, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg14_economides_comment.pdf.

We have serious concerns regarding the potential under-enforcement of section 7 of the Clayton Act against anticompetitive mergers, including anticompetitive vertical mergers. And although we support legislation to strengthen the antitrust statutes, we recognize that the vertical merger guidelines must reflect current law. The 2010 Horizontal Merger Guidelines have endured through Democratic and Republican Administrations, and we hope that the same will ultimately be true for the final vertical merger guidelines that are issued at the end of this process. To that end, we urge you to develop vertical merger guidelines with an eye toward gaining support that is bipartisan, if not unanimous.

We encourage your agencies to resume public consideration of the vertical merger guidelines and to issue revised draft guidelines for public comment, reflecting the substantial input you have received. We look forward to further progress on this matter.

Sincerely,

Amy Klobuchar
United States Senator

Patrick Leahy
United States Senator

Richard Blumenthal
United States Senator

Cory A. Booker
United States Senator

Mazie K. Hirono
United States Senator

Jeffrey A. Merkley
United States Senator

Tammy Baldwin
United States Senator

Edward J. Markey
United States Senator