February 28, 2022

Chair Lina Khan
Commissioner Rebecca Slaughter
Commissioner Noah Phillips
Commissioner Christine Wilson

Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Solicitation for Public Comments on the Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail, Docket No. FTC-2021-0068-0002

Via electronic submission

Dear Chair Khan and Commissioners Slaughter, Phillips, and Wilson:

The National Grocers Association (NGA) appreciates the opportunity to submit comments to the Federal Trade Commission's (FTC) request for comments *re: Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail (FTC-2021-0068-0002).* Independent grocers and their wholesalers are positioned in the retail and consumer goods sector to provide unique insight into food supply chain practices and the needs of consumers. A variety of factors are to blame for disruptions in the food retail sector, including acute labor shortages, limited trucking and freight capacity, and pandemic-related constraints on product sourcing and imports. However, the impact of these recent supply disruptions has not been felt equally by all players in the marketplace as dominant grocery firms have taken advantage of supply disruptions to further entrench their economic power at the expense of smaller competitors like independent grocers.

NGA is the national trade association that represents independent community grocers and their wholesalers. Independent grocers are privately-owned or controlled food retail companies operating in a variety of formats. Most independent operators are serviced by efficient and vertically integrated wholesale distributors that scale across multiple states and regions. Other independents are partially or fully self-distributing. Independents are the true entrepreneurs of the grocery industry and dedicated to their customers, associates, and communities. In the United States, the industry accounts for approximately $131 billion in annual sales and employs nearly 1 million workers. Nearly half of NGA's members are small business owners. America's approximately 21,000 independent grocers are the heart of local communities, where they provide jobs and boost tax revenue while bringing choice, convenience, and value to hard-working Americans. They maintain a loyal customer base because they are deeply rooted in the communities in which they operate. In fact, independents differentiate themselves from their large chain competition by offering locally and regionally produced food products. Their flexible supply chain practices enable them to support smaller-scale businesses, creating economic opportunities for local farmers and ranchers.

Unfortunately, NGA's members compete in markets that are increasingly dominated by a handful of national and international chains. These dominant chains wield tremendous economic power to the detriment of independent retailers, producers, and the American consumer. For decades, they have used their "buyer power" to dictate terms and conditions to suppliers, which in turn forces suppliers to discriminate against independent grocers and drives consolidation at every level of the food supply chain. Buyer power also harms small and mid-sized producers, such as independent farmers and ranchers, who are paid prices far below competitive levels.

Although these problems are not new, the grocery industry power buyers have taken advantage of recent disruptions by leveraging their dominance to gain market share while forcing their smaller competitors to bear the brunt of product shortages and inflation pressures. The largest players successfully demand priority access to high-demand grocery and consumer goods products. We believe these same firms are requiring their suppliers to offset inflationary pressures by charging higher prices to their smaller customers as they maintain favorable pricing and price terms.

The most conspicuous example of this behavior is that of Wal-Mart, by far the most dominant grocery retailer in the industry. It controls approximately 30 percent of America's grocery spend, meaning it has the power to grant or deny a food supplier's access to 30 percent of American households. It's ability to leverage this power to unilaterally demand concessions from suppliers is legendary. In September 2020, while manufacturers and suppliers throughout supply chains were struggling to safely meet demand during the COVID-19 pandemic, Wal-Mart demanded 98 percent on time, in full deliveries for their vendors[1]. Wal-Mart punishes suppliers that fail to meet its demands by charging a penalty of 3 percent of the cost of goods sold—a huge penalty in an industry with razor-thin margins. During the holiday rush of 2021, NGA's retail and wholesale members received notices from vendors describing significant price increases and fresh warnings of new products to be placed on limited allocation due to supply chain constraints. Around the same time that these letters flooded the inboxes of independent grocers and wholesalers, Wal-Mart gave its quarterly earnings report and forecasted that supply disruptions and inflation would have a minimal impact on the availability of product and retail pricing[2]. What became apparent was that Walmart was not only using its muscle to demand priority access to consumer products, but it also resisted inflationary increases by refusing to pay more when suppliers increased costs. Wal-Mart's squeeze on suppliers meant they had no choice but to limit product offerings and demand

[1] https://talkbusiness.net/2020/09/walmart-demands-all-suppliers-comply-with-98-on-time-in-full-shipment-rule/

[2] https://www.wsj.com/articles/walmart-raises-forecast-and-says-shelves-are-stocked-for-holiday-shoppers-11637066985

inflationary increases on competing grocers.

The Wal-Mart example is yet one among a pattern of behavior among dominant grocery firms that benefit from their size and leverage in the marketplace during a time of supply chain upheaval. The experience of independent grocers and their consumers throughout the pandemic brought the issue of economic discrimination to the forefront of the minds the American people. As manufacturers and suppliers struggle to keep up with historic levels of demand from the grocery channel, suppliers have no choice but to place allocations and restrictions on product flow to retailers and wholesalers. Unfortunately, these allocations have not been applied equally and independent grocers do not receive their fair share. We observe numerous examples of products that NGA members cannot get in adequate quantities, or simply cannot get at all. But those same products would be available in abundance of the shelves of our big box competitors – often on aisle end caps where a grocer promotes products by giving them special visibility. Towards the beginning of the pandemic, this included hand sanitizer, disinfecting wipes, paper towels, toilet papers, as well as shelf-stable food items. For example, independent grocers were the last to regain access to products like canned vegetables, soups, dried pasta, and even private label products compared to our largest chain competitors who commanded priority delivery.

Unfair product allocation was not the only problem that grew worse during the pandemic. Discrimination in pricing became even more rampant. The most dominant chain grocers like Wal-Mart generally operate on an "every-day-low-pricing" model with their suppliers. That means they always receive the lowest possible price from the supplier, and generally don't receive additional discounts. Independent grocers and their wholesalers generally cannot get every-day-low-pricing from suppliers. Instead, they rely on promotional allowances from suppliers that are used to offset higher wholesale prices. That, together with ultra-low margins, allow independents to stay price competitive most of the time. But even with promotional allowances independent grocer wholesale prices are often higher than the retail prices at big box competitors on many items.

During the pandemic, price discrimination got even worse. Suppliers eliminated promotional allowances to independent grocery stores on many products. As a result, independents couldn't offer the in store promotional prices that our customers expect. But that was only half of the problem. Although suppliers ended promotional allowances to independents, they did not change their every-day-low-price programs with the dominant chains. With the lack of promotional funds, NGA member wholesale prices went up, the big chains' prices stayed the same.

This pattern has continued throughout the pandemic and current cycle of supply chain disruption the industry experiences today. To be clear, economic discrimination is certainly not the only economic factor driving disruptions in the grocery sector. Every industry participant – large and small – is facing many of the same pressures, such as a depleted workforce due to a persistent labor shortage and Covid-19 variants, transportation and freight challenges, and weather-related disruptions. Grocery shelves often appear barren across all industry participants, but the reality since disruptions started in 2020 is that independent grocers are at a greater disadvantage than ever as suppliers are required to cater to the needs of their largest customers.

Increasing economic discrimination at a time of supply chain disruption has accelerated the erosion of competition in the grocery marketplace. It has harmed consumer welfare by limiting access to consumer products and contributing to retail price increases. Independent grocers play a crucial role in ensuring food access, especially in smaller, rural communities as well as high density urban ones where independents tend to locate. These communities have disproportionately suffered from unfair distributions and forced to travel longer distances to find the products they need at more crowded large chain retailers. Independents also tend to locate in low-income markets where shoppers often live on a fixed income, rely on public assistance, and have limited transportation options.

The anticompetitive behaviors NGA has witnessed cannot be explained or justified by arguments about efficiency or economies of scale. Dominant retailers are no more efficient than independent grocers who can only survive in today's marketplace through scale. Most independents participate in buying groups and vertically integrated wholesale arrangements enabling them to capture the same efficiencies as their larger competition. They have same multi-billion-dollar-plus warehouse facilities and distribution capacity as the large chains. Despite the fact that independent wholesalers can buy equally as efficiently as their larger counterparts in the same or similar quantities, our members generally pay higher prices at wholesale. Differential pricing has little to do with efficiency, and everything to do how suppliers respond to market power. We estimate that 5 retail firms control roughly 65 percent of the national grocery market share. Food & Water Watch estimates even greater consolidation of 69 percent of the national grocery market split between just 4 firms[3]. This level of consolidation makes the largest firms critical gatekeepers between grocery suppliers and consumers. Importantly, this dynamic lends itself to an asymmetric dependency; the dominant grocery retailers are not nearly as dependent on a particular supplier as the supplier is on the retailer. This is because particular grocery supplier's products generally represent only a small fraction of a grocery retailer's sales, which may encompass tens of thousands of products. As a result, a dominant retailer has a substantial advantage over its suppliers in a negotiation because the risk for the retailer, if the supplier refuses its demands and no deal results, is substantially smaller than it is for the supplier.

Some believe that price discrimination in response to market power is acceptable because the dominant chains will pass through the savings and their customers will get the lowest price. This assumption is demonstrably false. Large firms offer low prices for the same reason as independents: to compete and win customers. When their independent competitors get driven out

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[3] https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf

of business because they can't compete on price, the big chains face weaker or no competition at all. When competition is limited in a local market, NGA wholesalers find in routine price studies that the larger chains then charge higher prices. The result is that consumers have fewer choices and pay higher prices. As price discrimination has increased during the current cycle of inflation, this problem has only grown worse. As noted above, independents cater to marketplaces where chains don't operate – low income rural or urban areas. As a result, the most vulnerable Americans suffer the most from price discrimination on top of inflationary pressures.

When suppliers are forced to discriminate against customers in distributing product in short supply it's not because the larger retailers are better at moving product. In fact, the opposite is true. The pandemic brought this dramatically to light as independent segment growth outpaced that of big box competitors. Consumers prefer to shop at their local grocery store rather than go to a crowded big box store during the pandemic. According to SPINS data from June of 2021, total sales for independents were up by 16.6% and Conventional Multi Outlet is up 9.4%[4]. This phenomenon has been corroborated by numerous NGA independent retailers who do research on their competition. Due to pressure from power buyers, suppliers decided to act irrationally and invest their limited product with underperforming retailers who already squeeze their margins. Grocery vendors did not act against the economic interest because their larger customers were more efficient and could move product quicker. They did it because those largest chains happen to be the customers that they can't refuse and they are left with no choice. Instead of visiting their local grocery store as they preferred, consumers were forced into the arms of the larger competition where they prefer not to shop.

The FTC has limited tools available to address supply chain disruptions and inflation. The agency is limited in its power to address the labor shortages, limited freight capacity, weather-related disruptions, and import and foreign trade challenges that all play a part in the disruptions that grocers and consumers face. However, the agency does have tools available to limit the impact that anticompetitive practices in the grocery supply chain has on consumers. The Robinson-Patman Act prohibits anticompetitive economic discrimination against independent business. Despite a decades-long hiatus in enforcement of Robinson-Patman, the agency can use this law as a tool to protect the free market, independent businesses, the food supply chain, and American consumers.

Although some argue that Robinson-Patman enforcement would only increase inflation and spell even higher prices for consumers, we believe the opposite is true. NGA is not seeking an enforcement regime where little consideration was provided for efficiencies in the marketplace derived from scale and volume purchasing. FTC enforcement should permit efficiencies that maximize consumer welfare but prohibit conduct that harms competition and consumers. Enforcement should distinguish between true marketplace efficiencies and discrimination that

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[4] https://www.spins.com/resources-shopping-behavior-4-post-covid-consumer-habits/

results from abuses of market power. Unfortunately the agency has conflated market power with efficiency in its lax enforcement approach, but it is critical to reconsider and challenge long-held assumptions as new evidence surfaces.

Although the current crisis has exacerbated economic discrimination in the grocery sector, this phenomenon is not confined to the pandemic. For decades, independent grocers have not had equal access to pricing, promotions and packaging deals that are provided to large firms. Power buyers often seek to justify discriminatory treatment targeting independent grocers – and avoid condemnation under the antitrust laws – by arguing that independent grocery stores are in a different "channel of trade" and are therefore not competitors. But these channel distinctions do not reflect reality. Independent grocery stores vary widely in size and format, including ones that rival the biggest national chains in size. And the evidence shows that consumers see big box, club stores, dollar stores, and "traditional" grocery stores as alternatives for an array of products, including core staples such as packaged goods, paper products, and cleaning supplies. These practices will only continue after the pandemic is over unless antitrust enforcers like the FTC acts. Consequently, consumers will face reductions in diversity in the marketplace, and choices will be limited to what the few remaining mega-retailers find most profitable.

We urge you to closely investigate how anticompetitive economic discrimination has harmed grocery industry competition and consumers as the agency pursues a 6(b) study on supply chain disruptions. We believe you will find strong evidence of discrimination as you pursue this process. We hope such evidence will provide a strong basis for the agency to dust off the Robinson-Patman Act and go to work to protect the free market, independent businesses, the food supply chain, and America's consumers.

Thank you for the opportunity to provide the perspective of the independent supermarket sector. Please do not hesitate to contact me should you have questions or need further information.

Sincerely,

Chris Jones
Senior Vice President of Government Relations & Counsel
National Grocers Association