CENTER FOR Science IN THE Public Interest
The nonprofit publisher of Nutrition Action Healthletter

March 14, 2022

VIA ELECTRONIC FILING

The Honorable Lina M. Khan, Chair
The Honorable Noah Phillips, Commissioner
The Honorable Rebecca Slaughter, Commissioner
The Honorable Christine Wilson, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail [Docket ID FTC-2021-0068]

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

The Center for Science in the Public Interest (CSPI) respectfully submits these comments in response to the Federal Trade Commission (FTC) solicitation for public comments on the impact of supply chain disruptions on competition in consumer goods and retail. CSPI is an independent, science-based consumer advocacy organization that has worked for over 50 years to improve the food system to support healthy eating.

In 2021, CSPI submitted a letter requesting that the FTC investigate under Section 6(b) of the FTC Act food retailer and manufacturer marketing practices of antitrust and consumer protection concern, including trade promotion practices and category captain arrangements. Since then, supply chain disruptions have further exacerbated the previously identified threats to competition and consumer choice in the food retail marketplace.

Trade promotion practices alter the food retail environment, impacting consumer behavior and market fairness. Manufacturers use trade promotion practices to dictate product price, placement, and promotion in the grocery store.[1] Contracts between manufacturers and retailers referred to as cooperative marketing agreements (CMAs) detail the substantial fees that manufacturers pay to retailers in exchange for this control of the food retail environment.[2] A review of manufacturer influence on retailer marketing strategies indicates their tactics manipulate the retail environment and unduly influence consumer purchasing behavior through pricing promotions and prominent store placement, including at the checkout aisle and on ends of aisle.[3] CSPI has criticized these agreements on the grounds that smaller companies offering more nutritious fare may be unable to pay these fees and secure shelf space.

CMAs can also include exorbitant slotting fees associated with the introduction of new products; in fact, a 2003 FTC report estimated that nationwide introduction of a single grocery product costs $1.5 to $2 million in slotting fees.[4] These trade promotion practices create barriers to entry that threaten competition by disadvantaging smaller manufacturers and producers who may then be unable to introduce or expand product offerings. When retailers demand fees that only dominant suppliers can afford to pay, it effectively forecloses competitive opportunities for alternative suppliers, reduces market flexibility, and decreases consumer choice.

Manufacturers exert influence in the grocery store in part through category captain arrangements. Category captains are dominant manufacturers that pay retailers in exchange for control of product price, placement, and promotion across an entire food category.[5] As part of the agreement, manufacturers gain access to competitor information, such as price, sales, and promotional plans, and use this information to dictate placement and promotion of both their products and those of competitors.[6]

COVID-19 supply chain disruptions intensify these existing anticompetitive threats in the food retail marketplace. Barren shelves further diminish consumer choice; out-of-stock levels for food products rose to 15% in early 2022,[7] in part the result of food distributors' inability to obtain products, especially processed items, from food manufacturers.[8] We currently lack the necessary information to understand if the contracts and category captain arrangements that dictate specific product placement and promotion contribute to retailers' struggle to keep shelves stocked and products available to consumers. But they are unlikely to help. For example, do CMAs continue to restrict retailers' stocking decisions if a product with a slotting fee becomes unavailable? Would category captains change their pricing, placement, and promotion decisions across an entire food category to benefit consumers if their companies' supply chain faces delays, or would they continue to follow policies that maximize the promotion and placement of their own products? Have these trade promotion practices restricted competition to the point that there is limited capacity to step in should a shortage occur? Thankfully, the FTC has ordered retailers and manufacturers to disclose documents that may provide answers to these questions and inform a broader understanding of how retailer and manufacturer anticompetitive marketing practices may impede supply chain disruption response, to the detriment of consumers.

We understand that the scope of requests provided to retailers, wholesalers, and manufacturers are broad enough to include the online food retail environment as well. This is important because online grocery sales skyrocketed during the COVID-19 pandemic[9] and will account for 20% of U.S. grocery sales by 2026.[10] Trade promotion practices online similarly shape the virtual supermarket as large food and beverage manufacturers influence consumers through search ordering, paid banner ads, pop-ups, and email promotions.[11] Similar antitrust concerns arise as smaller and newer companies struggle to compete in the online marketplace given the cost to introduce new products.[12] Additionally, consumer protection concerns arise in online grocery shopping as customers reasonably assume that the results of their search are ranked based on the relevance to their search query, and not on whether a manufacturer has made payments to promote its products.[13]

Thank you for the opportunity to share CSPI's perspectives on maintaining a fair and competitive food retail environment that operates in the best interest of America's consumers and their health.

Respectfully,

Center for Science in the Public Interest

---

[1] CSPI, Rigged: Supermarket Shelves for Sales 4, 11 (Sept. 2016), https://bit.ly/2NRGI2l.
[2] *Id.*
[3] Hecht, A.A., Perez, C.L., Polascek, M., Thorndike, A.N., Franckle, R.L. and Moran, A.J., (2020). Influence of food and beverage companies on retailer marketing strategies and consumer behavior. *International journal of environmental research and public health*, *17*(20), p.7381.
[4] Federal Trade Commission, Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories (2003), https://bit.ly/3vUWCNx.
[5] American Antitrust Institute, Competitive Exclusion in Category Captain Arrangements 21-22, 28 (Aug. 30, 2018), https://bit.ly/3i1TXs8.
[6] *Id.*
[7] Cavale, S. and Walljasper, W. U.S. grocery shortage deepen as pandemic dries supplies, Reuters (Jan. 14, 2022), https://reut.rs/3HXuP1l.
[8] Patton, L., Elkin, E., and Shanker, D. Omicron's spread means more food outages at U.S. grocery stores, Bloomberg (Jan. 6, 2022), https://bloom.bg/3tLHCPb.
[9] Redman, R, FMI: Online grocery sales jumped 300% early in pandemic, Supermarket News (Oct. 9, 2020). https://bit.ly/3KznlDj.
[10] Redman, R, E-commerce to account for 20% of U.S. grocery market by 2026, Supermarket News (Oct. 22, 2021). https://bit.ly/3pVI50b.
[11] CSPI, Scroll and Shop 18-23, 31 (January 2020), https://bit.ly/35Foevx.
[12] Beckett, E. How big food drives impulse buys online, Food Dive (July 30, 2018), https://bit.ly/3asTBb3.
[13] FTC, 2013 Letter to Search Engines (June 24, 2013), https://bit.ly/39DA1td.