



October 28, 2021

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

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

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

The undersigned organizations write to seek your leadership in addressing the anticompetitive effects of economic discrimination. In recent decades, we have witnessed a handful of companies amass incredible power and influence at the expense of small and medium sized businesses and ultimately consumers. We urge the FTC to use its authority to investigate and bring enforcement actions against conduct that violates the Robinson-Patman Act.

Small and medium-sized businesses are an essential source of competition in increasingly concentrated markets. They compete on price, quality, service and convenience, and often serves as anchors to local communities. Economic discrimination reduces or eliminates that competition. Today, dominant companies wield unprecedented economic power—too often with little or no antitrust oversight or enforcement. As a result of unprecedented levels of concentration, small and medium-sized businesses are increasingly subject to discriminatory terms and conditions, including less favorable pricing and price terms, less favorable supply, less favorable retail packaging, and sometimes an inability to access products in short supply that are available to their competitors.

Farmers and ranchers also suffer from high levels of concentration in the food supply chain. Concentration at the retail and supplier level has advanced to the point where just a handful of firms compete to buy agriculture products. A lack of competition at the farmgate results in unreasonable producer demands and it drives down the prices paid to farmers and ranchers to anticompetitive lows. But consumers do not see the advantages of those low acquisition costs because the large suppliers capture that revenue and price discrimination among retailers reduces price competition in the retail market.

Some large suppliers attempt to argue that consumers are better off with the current system of price discrimination, but that argument cannot hold. For example, food and beverage distributors justify price discrimination (including, in many cases, when disconnected from quantity purchases) by contending that certain larger retailers occupy a different class or level of trade than their competitors. These lower prices, however, are not the result of cost savings or other

efficiencies that would make them functional discounts. Likewise, independent non-chain pharmacies pay a higher net price for drugs than vertically integrated mail order or retail pharmacies who benefit from spread pricing and formulary rebate offsets. Economic discrimination should not be excused as an exercise of efficiency when small and medium-sized businesses take advantage of the same economies of scale as their largest rivals through coops, group buying, or other mechanisms. And, these arguments miss not only that the large businesses that are able to acquire goods at lower prices face less competition, and therefore have the ability to build-in larger margins than they otherwise would, but also that many consumers live in localities where their only shopping options are smaller businesses that must pay higher prices for goods. These consumers, typically located in rural areas and inner cities, are most often lower income and bear the brunt of the price disadvantages that price discrimination imposes.

The problems that flow from economic discrimination have been laid bare during the COVID-19 pandemic. Throughout the crisis, dominant companies have received preferential treatment in supply shortage scenarios, meaning they get access to critical goods and services that smaller firms do not. These shortages occur in the first place because concentration creates a lack of supply chain redundancy and resiliency. As the pandemic illustrated, capacity cannot easily increase in concentrated markets, so when one firm experiences a shock, everyone suffers. These problems too are unequally distributed across the economy and tend to impact lower income consumers to a much greater extent than higher income consumers.

This outcome was not inevitable. The antitrust laws were designed to protect against anticompetitive economic discrimination. Congress recognized the benefits of independent business and the threats posed by economic discrimination when it enacted the Robinson-Patman Act, a law designed to foster robust competition and to protect against coercion by dominant firms. Among other things, the statute makes it unlawful to “discriminate in price between different purchasers of commodities of like grade and quantity” if the purchasers are competitors.¹

The Robinson-Patman Act reflects Congress’s determination that discriminatory treatment among competitors is pernicious and should be prohibited. But current enforcement efforts have failed to address these anticompetitive harms, and judges have inappropriately limited the scope of the law despite clear statutory language. Despite Congress’s broad goals in 1936, the FTC has not brought a case under the Robinson-Patman Act in more than 20 years. Nor has the FTC brought an enforcement action against economic discrimination using the other antitrust laws.

We urge the Commission to use the Robinson-Patman Act and its other authority under the antitrust laws to hold businesses accountable. The FTC must shine a light on this important issue and consider timely measures to restore and protect a functioning competitive marketplace. Specifically, we propose:

¹ 15 U.S.C. § 13(a).



- The FTC should use its authority under the Robinson-Patman Act to bring enforcement actions against anticompetitive economic discrimination.
- The FTC should immediately use its authority under 6(b) of the Federal Trade Commission Act to study economic discrimination. In this and other inquiries, the FTC should look beyond price effects to include other dimensions of competition, including impacts on quality, service, and convenience as a result of economic discrimination and increasing consolidation.
- The FTC should investigate the arrangements between dominant retailers and suppliers to determine whether these arrangements result in economic discrimination that harms smaller rivals. This should include the important issue of whether “channels of trade” distinctions are being used to evade laws against economic discrimination.
- The FTC should investigate whether economic discrimination and buyer power have led to concentration throughout supply chains, especially in the food and agriculture sector.

We recognize that America is facing an unprecedented emergency, and there are many urgent needs that the FTC is focused on. As the Commission tackles competing priorities, it is essential that it does not overlook anticompetitive economic discrimination.

Sincerely,

American Beverage Licensees

Energy Marketers Association

National Association of Convenience Stores

National Community Pharmacists Association

National Grocers Association

Organic Farmers Association

Protect Our Restaurants

cc:

Jerry Nadler, Chairman, House Judiciary Committee
Jim Jordan, Ranking Member, House Judiciary Committee
David Cicilline, Chairman, House Antitrust Subcommittee
Ken Buck, Ranking Member, House Antitrust Subcommittee
Dick Durbin, Chairman, Senate Judiciary Committee
Chuck Grassley, Ranking Member, Senate Judiciary Committee
Amy Klobuchar, Chair, Senate Antitrust Subcommittee
Mike Lee, Ranking Member, Senate Antitrust Subcommittee
Tim Wu, Special Assistant to the President
Bharat Ramamurti, Deputy Director, National Economic Council

Examples of Economic Discrimination by Industry

Grocery Sector

National Grocers Association Antitrust Whitepaper: *“Economic discrimination has a two-fold effect on smaller competitors such as independent grocers: First, the powerful buyer secures more advantageous terms for itself. Second, the powerful buyer imposes higher purchasing costs or other disadvantages on its rivals, as suppliers seek to make up for the discounts and other advantages they are forced to extend to the powerful buyer with higher charges to other buyers.”*²

Oatley IPO F-1 SEC Registration Statement: *“[Grocery] consolidation has produced larger, more sophisticated organizations with increased negotiating and buying power that are able to resist price increases, as well as operate with lower inventories, decrease the number of brands that they carry and increase their emphasis on private label products, all of which could negatively impact our business.”*³

Pepsico 2020 10-K SEC Filing: *“The retail industry is also impacted by increased consolidation of ownership and purchasing power, particularly in North America, Europe and Latin America, resulting in large retailers or buying groups with increased purchasing power, impacting our ability to compete in these areas. Consolidation also adversely impacts our smaller customers’ ability to compete effectively, resulting in an inability on their part to pay for our products or reduced or canceled orders of our products. Further, we must maintain mutually beneficial relationships with our key customers, including Walmart, to compete effectively.”*⁴

TreeHouse 2020 10-K SEC Filing: *“As our customer base continues to consolidate, we expect competition to intensify as we compete for the business of fewer large customers. As this trend continues and such customers grow larger, they may seek to use their position to improve their profitability through improved efficiency, lower pricing, or increased promotional programs. If we are unable to use our scale, product innovation, and category leadership positions to respond to these demands, our profitability or volume growth could be negatively impacted.”*⁵

Pharmacy

Vertically integrated, PBM-owned or affiliated mail order or retail pharmacies benefit, at the expense of their competitors and patients, in their net drug reimbursements, fees, and pricing from offsets led by opaque spread pricing schemes and formulary rebates, which they alone control. Nowhere is this more obvious than in the fast-growing specialty drug prescription marketplace (a category that now represents over 50% of the market) where over 60% of all specialty prescriptions are steered into PBM-owned or affiliated pharmacies.

² <https://www.nationalgrocers.org/wp-content/uploads/2021/06/NGA-Antitrust-White-Paper.pdf>

³ <https://www.sec.gov/Archives/edgar/data/1843586/000119312521121323/d123209dfl.htm>

⁴ <https://www.sec.gov/ix?doc=/Archives/edgar/data/77476/000007747621000007/pep-20201226.htm>

⁵ https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_THS_2020.pdf

Convenience/Fuel Marketing

For many years, manufacturers and suppliers of a number of goods have separated retailers who sell their products into different channel categories and discriminated among them with respect to both prices and the availability of certain products (in particular, by not making certain product packaging sizes available). The companies making and distributing non-alcoholic beverages, sodas, sports drinks, and the like, have been the most aggressive and consistent at enforcing these distinctions along the lines of retail channels. This means that a local convenience store must pay more for a bottle or can of a soda than its competitor down the street that operates a grocery store or big box store. These price differentials are so large that convenience stores often pay more to buy these products at wholesale than their competitors sell them at retail – and that is true even when convenience retailers purchase a larger volume of these products than competitors and when they offer to transport the products to stores themselves to remove any potential transportation cost differential.

Agriculture

Agriculture producers and farmer cooperatives that sell direct to retailers are often strong-armed by dominant firms whose market power gives them superior negotiating leverage. Farmers are squeezed on price and forced into unreasonable contractual terms such as one-sided indemnity provisions and liability arrangements. Further, farmers are increasingly facing onerous production and processing standards demanded by dominant retailers who control access to American consumers.

Alcohol/Beverage

Following the repeal of Prohibition, federal laws such as the Federal Alcohol Administration Act were enacted to prevent the retail tier of the alcohol industry from being subjected to tied-house and other market evils perpetrated by alcohol suppliers before Prohibition. However, retail consolidation has shifted alcohol market leverage to large, corporate fast-moving consumer goods (FMCG) retailers, who now wield meaningful power over other industry stakeholders.

Given their national footprints, and despite state-by-state laws that usually work effectively for intra-state alcohol commerce and create competitive markets that benefit consumers, these mega-retailers can leverage their national business with distributors and suppliers to induce other parties in the three-tier ecosystem to act in anticompetitive ways. In some instances, this power has led to the inability of small retailers to access familiar products or receive a level of service afforded to these large retail corporations.

Shipping/ E-Commerce

Shipping and delivery companies have placed restrictions on specific online retailers during periods of demand surges. The Wall Street Journal reported that a large shipping company placed restrictions and limits on six retail customers potentially in a move to satisfy the demands



of their largest customers.⁶ Capacity constraints in cargo shipping is also reported to favor larger businesses with superior bargaining leverage, as “smaller competitors are often at a disadvantage when negotiating with suppliers or competing for space on container ships as rates surge on tight shipping capacity.”⁷

⁶ https://www.wsj.com/articles/ups-slaps-shipping-limits-on-gap-nike-to-manage-e-commerce-surge-11606926669?reflink=desktopwebshare_twitter&mod=e2twlx

⁷ <https://www.wsj.com/articles/big-box-retailers-battle-for-inventory-in-bet-on-strong-holiday-sales-11631824252>