



January 28, 2022

Via Electronic Filing – www.regulations.gov

Lina M. Khan, Chair
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Noah Phillips, Commissioner
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Rebecca Slaughter, Commissioner
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Christine Wilson, Commissioner
U.S. 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 & Wilson:

The National Association of Convenience Stores (NACS), representing an industry of over 148,000 retail stores and over 2 million employees in the United States, welcomes the opportunity to comment on the Federal Trade Commission's (FTC) 6(b) study into supply chain disruptions on consumer goods and retail. NACS represents retailers of all sizes, from large national and international retailers to single store operators. Convenience retailers of all sizes have had frequent problems with keeping products in-stock during the COVID-19 pandemic.

Like most in the food retail sector, convenience operators have seen a significant increase in out-of-stocks in our stores due to the unavailability of products from suppliers. These out-of-stocks have covered a wide variety of primarily center-store items such as shelf stable food items and immediate consumption snack foods. Our members have also experienced a dramatic increase in out-of-stock issues in the cold packaged beverage category which covers non-alcoholic beverage products such as soda products, energy and sports drinks, and bottled water.

The unavailability of workers at bottling plants and a lack of drivers to deliver products are among the reasons for the increase in out-of-stock issues for packaged beverages. This particular category suffers from other systemic, long term and self-inflicted failures which are likely exacerbating legitimate COVID-19 related supply chain issues now.

Over many years, we have heard a similar complaint from member companies pertaining most often to the cold package beverage suppliers. This complaint is not restricted to any particular size of convenience operator. It has come from both large and small operators alike. That is the issue of channel price and product discrimination against our industry. Over many decades now, retailers in the convenience store channel have noticed that competitors in other channels, be it big box, grocery or dollar stores, are often able to offer

these beverage products at retail at a lower cost than convenience retailers can obtain them wholesale. The fact that this issue is longstanding and consistent would indicate that other channels of retail are able to obtain these products at a lower wholesale cost than is made available to convenience retailers, regardless of size. In some cases, we know that is exactly what is happening. NACS has previously provided the FTC with testimony delivered to the Indiana State Legislature by one convenience retailer who also operates an orchard. His testimony showed that he could purchase cases of soda products at the orchard for roughly half the cost he was charged for his convenience stores. That occurred despite the convenience stores purchasing a significantly higher volume of the products. This kind of channel price discrimination is rampant in our industry.

But pricing isn't the only form that this discrimination takes. Retailers in our industry are also often unable to get similar packaging sizes from suppliers that are made available to other channels, often regardless of price. For example, a number of retailers have indicated that they can only get the 32 oz version of a particular sports drink while other channels of retail are offered a 28 oz version of the same. The only reason given for this disparity is often that the smaller version is not "channeled" for convenience. This type of arbitrary restriction based on retail channel reduces the fungibility of products and thereby increases the strain caused by supply chain disruptions as products cannot be diverted to the stores in which they are most needed – leading to some store shelves going empty even while some sizes of the same product remain available to other stores in different retail channels.

As stated, this issue is widespread and pervasive and convenience retailers remain essentially powerless to rectify it under current market conditions. NACS staff has spoken to a number of retailers who have told similar stories of efforts to rectify or to work around this price and product discrimination issue. All, regardless of size and purchasing power, have failed to reach a satisfactory resolution. Some retailers have attempted to find alternative sourcing, including purchasing product at retail from big box stores only to have the beverage company or bottling company threaten retaliatory action against that retailer, the convenience retailer or both. Attempts to reach a resolution directly with the supplier companies have failed as well. When convenience retailers attempt to negotiate different pricing they are often told that the price others may get are simply not for our channel with little or no further explanation given. This problem is particularly acute in many underserved communities such as very rural or inner-city urban neighborhoods. Our industry is often a primary source of basic grocery products in these communities which sometimes lack larger grocery stores. Greater than 90% of the U.S. population lives within 10 miles of a convenience store, something that cannot be said for any other channel of retail.

The pervasive practices of many of these companies are not restricted to wholesale pricing or product restrictions either. In many cases, they extend into the pricing structures that convenience retailers are able to offer to consumers. Often, supplier companies will insist that retailers offer their products at a certain price or with a certain offer, such as a buy one get one free type offer, in order to get a certain price, even if that retail offer is unsustainable to the retailer. If the retailer wishes to offer a different promotion or different pricing they are often told that they will then be charged a higher wholesale price. Alarming, we have been told of situations where this has occurred even when the convenience retailer wished to sell the beverage to consumers at a lower retail price than the supplier wanted. In fact one regional retail operator informed their supplier that a promotion they were expected to offer in their store in exchange for a certain wholesale price of the product was not beneficial. When the retailer expressed an interest in offering a different promotion that was more generous to the consumer in order to attempt to drive traffic to the store, the supplier

informed them that if they did so they would have to pay a higher wholesale price for the product. This action, designed to externally control the profit margins of retailers, is unfortunately not a unique example.

There is clearly a market failure which exists in the nonalcoholic beverage market which is, at a minimum, likely exacerbating supply issues being experienced due to the COVID-19 pandemic. This category of products is controlled by a very narrow group of supplier companies. In fact, just three companies dominate this category. Coca-Cola, Pepsi, and Keurig, Dr. Pepper control over 98% of the carbonated beverage market in the convenience channel. When expanded to all packaged beverage sales, those three companies still control nearly 49% of the market. NACS is concerned that the existing scope of the 6(b) study does not encompass this serious and pervasive factor. We encourage the FTC to include this type of channel discrimination in its review of supply chain issues.

Furthermore, we request that the FTC review existing law to find a potential resolution to this matter. It is our belief that proper enforcement of existing anti-trust law such as the Robinson-Patman Act would address the concerns we have expressed in these comments. Proper enforcement of Robinson-Patman would alleviate the real-world harm done to consumers by channel price and product discrimination. Any time one channel of retail is essentially prohibited from setting their own prices or competing on a level playing field for customers in offering competitive pricing and packaging as their competitors, consumer harm is inevitably done. The Commission does not need further statutory authority to take action here. By using the Robinson Patman Act to take appropriate enforcement action, the FTC could begin to alleviate this market failure in short order. Such enforcement would send a clear message to companies in the market that they need to comply with the law or risk liability. The signal that Robinson Patman remains viable is an important one for market participants to receive and could have far-reaching effects beyond the specific companies involved in any given enforcement action.

NACS appreciates the opportunity to comment on the 6(b) study and would welcome the opportunity to provide additional information.

Sincerely,



Jon Taets
Director, Government Relations
National Association of Convenience Stores