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Independent supermarkets and their wholesalers compete at a disadvantage due to lax enforcement of U.S. antitrust laws. The Robinson-Patman Act (RPA) was passed by Congress in 1936 to protect small businesses from discriminatory terms of trade such as price discrimination. Unfortunately, this law is no longer enforced by regulators – it has been more than 20 years since federal enforcement agencies have filed a lawsuit alleging an RPA violation. As a result, dominant players in the grocery marketplace, including “Big Tech” e-commerce giants, can effectively use their “buyer power” to impose conditions on manufacturers and suppliers that disadvantage smaller rivals and impair their ability to compete. This issue of economic discrimination – in addition to growing concentration in the grocery supply chain – significantly impacts both independent grocers and American consumers.

Background:

The COVID-19 pandemic has made the grocery supply chain literally a kitchen table issue for the American people. Inconsistent distribution and apparent shortages of consumer good staples has made it difficult for consumers to obtain high-demand products like paper products, cleaning supplies, and popular packaged food brands, as well as other commodities. However, this is not just a symptom of the current crisis – it is the direct result of economic discrimination allowed by a lack of antitrust enforcement. Independent grocers and the communities they serve are harmed in the following ways:

- Large firm “power buyers” are leveraging their market power to demand prioritization for distribution of high-demand products while extracting concessions on wholesale pricing. As a result, independent grocers have lost access to both popular products and promotional pricing, making them unable to compete with their large rivals.
- Due to supply inequities, independent grocers have become less attractive to consumers seeking one-stop-shopping in the pandemic.
- Consumers that live in rural or low-income food insecure areas that are typically serviced by independents are disproportionately impacted and must travel longer distances to find the products they need at more crowded large chain retailers.
- Like many American small businesses, independent grocers are at a more severe economic disadvantage to their larger rivals during the pandemic, a period when big box retailers and e-commerce giants are generating record profits¹.

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. For example, dominant retailers have imposed arbitrary “channels of trade” classifications on manufacturers to justify discrimination against independent grocers and wholesalers on price and product availability, arguing, contrary to real world behavior, that grocery stores don’t compete with grocery sections of big box stores or e-commerce sites. Anticompetitive buyer power has also impacted the private label supply chain, reducing independent grocers’ access to products. Just like branded product manufacturers, private label manufacturers are forced to cater to the demands of dominant retail players over independents. As a result, budget-conscious consumers lose access to affordable alternatives at their convenient local grocer. And discrimination in product packaging or packaging sizing can confuse consumers, who may mistakenly believe that independent grocers are charging more than big box stores for the same products.

¹ New York Times, *Big-Box Retailers’ Profits Surge as Pandemic Marches On* (August 19, 2020): <https://nyti.ms/34hBvHA>





MODERNIZE & ENFORCE THE ROBINSON-PATMAN ACT

In 2005, NGA warned about this growing problem to the Antitrust Modernization Commission, concluding that the lack of enforcement of the RPA was “help[ing] accelerate the rush to “bigness” and “scale” in a business environment in which sheer size influences buyer/seller decisions.”² Unfortunately, regulators did not take seriously this growing threat and as a result the supermarket industry has experienced a rapid acceleration in concentration of economic power. These practices will only continue after the pandemic is over unless Congress or the antitrust regulators act. 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. Fortunately, recent congressional scrutiny of practices by dominant Big Tech firms has brought the issue to the surface again.

Position:

Recently, Big Tech investigations by Congress and the federal antitrust agencies have brought to light how large tech firms have amassed market power and pushed out smaller rivals without consequence. However, the same issues at play in the tech sphere also implicate the competitiveness of small and mid-sized business more generally—especially in the retail grocery sector. NGA believes that Congress and federal regulators must look beyond just Big Tech and bring antitrust laws into the 21st Century to reflect rapidly evolving competitive challenges and a changing marketplace for US consumers.

For decades, NGA has argued strong and effective enforcement of US antitrust laws is essential to preserving a vibrant marketplace and ensuring small and mid-size businesses are able to compete and flourish to the benefit of all Americans. More robust competition in the food retail space will also benefit food insecure areas, as independents will be more inclined to invest in food desert locations if they have an opportunity to compete on price and product availability. In general, NGA supports reforms to the antitrust laws that give enforcers new tools to address economic discrimination imposed by dominant firms, especially discrimination with respect to pricing, product availability, promotions and package sizes based on arbitrary channels of trade classifications. Power Buyers must not be allowed to get away with anticompetitive terms placed on producers that harm the competitiveness of smaller industry participants.

Antitrust reform and enforcement should recognize and promote the critical role played by small and independent business—including in the grocery and other retail sectors—in promoting consumer choice, convenience, customer service, product quality, and well-paying jobs—important dimensions of competition that have been all too often neglected under the past antitrust consensus. Finally, Congress should maintain vigilant oversight of the antitrust agencies’ enforcement of—and failures to enforce—the antitrust laws.

NGA Request:

Congress should reassert the goals of the Robinson-Patman Act by holding antitrust enforcement agencies accountable or pursuing legislative reforms that prohibit pernicious economic discrimination. Antitrust law modernization should address harm caused by power buyers and discriminatory vertical conduct by dominant firms that undermines the competitiveness of small and medium-sized independent retailers.

² Statement of J.H. Campbell, Jr., on Behalf of the National Grocers Association, Before the Antitrust Modernization Commission on the Robinson-Patman Act (July 28, 2005)

