Comments of the National Grocers Association
in Response to Solicitation for Public Comment
On Contract Terms that May Harm Competition

FTC-2021-0036-0022

September 30, 2021

The National Grocers Association represents independent community grocers across the country, as well as their wholesaler partners. An independent retailer is a privately-owned or controlled food retail company operating a variety of formats. The independent grocery sector is responsible for generating $255 billion to the U.S. economy, 1.2 million jobs, and $42 billion in wages. Our members are the true entrepreneurs of the grocery industry, passionately committed to their customers, their employees and the markets they serve. And they are at the heart of local communities, where they provide jobs and boost tax revenue while bringing choice, convenience and value to hard-working Americans.

NGA welcomes the Federal Trade Commission's focus on contract terms that may harm competition and appreciates the opportunity to submit these comments.

The grocery space has become increasingly concentrated, and dominant retailers are increasingly wielding their economic power to disadvantage independent grocers and their wholesalers, including through imposing contract terms that disadvantage independent grocery competitors. Dominant players like Walmart and Amazon exercise their economic power to dictate terms and conditions to suppliers, including more favorable pricing and price terms, more favorable packaging, and access to exclusive products. For example, the power buyers' retail prices are often lower than independent grocers' wholesale price on key products, making it impossible for independent grocers to compete on price given thin margins.

This is leading to increasing concentration throughout the grocery supply chain. In response to dominant retailers' demands for more favorable prices and terms, food and consumer goods manufacturers are increasingly consolidating. This concentration reduces product choice and increases prices for independent grocers and their consumers, and it has resulted in anticompetitively low prices paid to independent producers, such as ranchers and farmers.

This problem has only grown during the COVID-19 pandemic. While many independent grocers have struggled throughout the pandemic to stock must-have products, dominant retailers have received preferential treatment. And supplier concentration has made our food and consumer good supply chain more vulnerable to disruption.

The result of this unchecked buyer power is a system that benefits a select few at the expense of everyone else, including consumers, workers, and independent retailers and suppliers: consumers have a narrowing range of choice to shop for the goods and services they need; entrepreneurs and independent businesses struggle to start and sustain businesses; and producers such as farmers and ranchers are forced to accept unfavorable economic terms, conditions, and prices imposed by the largest members of a consolidated supply chain.

Economically Discriminatory Contract Terms

Dominant players in the grocery industry have used their buyer power to impose discriminatory terms and conditions on suppliers that disadvantage smaller, independent grocers and harm consumers. More recently, e-commerce giants have emerged using the same playbook. Because these powerful buyers are the gatekeepers to consumers, suppliers are left with virtually no leverage to negotiate. Examples of discriminatory terms and conditions in the grocery sector include:

- **Price discrimination:** charging one purchaser a more favorable price than other purchasers for the same product. Price discrimination in grocery can take the form of failures to provide price promotions or packaging with a lower per unit cost. It also comes in the form of less favorable payment terms. For example, certain power buyers demand and receive "scan-based payment" terms from suppliers, meaning they only pay once a product has been scanned for final sale to a customer. Meanwhile, the same suppliers require independent grocers to pay for products upon receipt (or within a fixed period of receipt), shifting the risk that a product sits on the shelves to the grocers. These terms provide significant advantages for dominant retailers, who in effect receive free credit on their purchases and can stock a greater diversity of products, without taking on any risk that the products will take time to sell, or will not sell at all.

- **Product supply discrimination:** refusing to supply products to independent grocers that are made available to powerful buyers, or favoring power buyers on allocations or delivery terms. Suppliers often enforce arbitrary minimums on certain products to effectively make them exclusive to power buyers. Others brazenly deny access to independents to entire product lines without justification while the same products fill the shelves of their chain competitors. Independent grocers have been told that they cannot purchase "test" products for months or even years after they have become widely available at Walmart or other large chains.

- **Packaging discrimination:** refusing to provide certain package sizes or promotional packaging to certain grocers, while providing them to competing retailers. Some manufacturers have stopped supplying large package size versions of products—that some consumers associate with greater value—to independent grocers while providing them to big box retailers or club stores. In addition, Dollar General has used its buyer power to demand "cheater size" products, which include smaller amounts in a package that can then be sold at a lower price. These "cheater size" products create a false impression among consumers that they are paying a lower price for the same product they see at independent grocers.

Discriminatory terms and conditions have 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. In many cases, the wholesale price offered to independent grocers is higher than the retail price at wholesale clubs like Costco. As a result, independent grocers often resort to buying entire pallets of must-have products from their competitors.

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The Commission should investigate the arrangements between grocery power buyers and suppliers to determine whether dominant retailer bargaining leverage is imposing discriminatory prices, terms, and supply on independent grocers. This should include whether "channels of trade" distinctions among competing grocery business are being used to evade laws against economic discrimination.

On behalf of its independent grocer members nationwide, NGA thanks the Commission for its attention to this issue. Please do not hesitate to contact Chris Jones, NGA's SVP of Government Relations & Counsel at cjones@nationalgrocers.org if you have questions or other follow up on this submission.