Modernize and Enforce The Robinson-Patman Act

The National Grocers Association (NGA) represents 21,000 independent community grocers and wholesalers across the United States. Independent community grocers account for 33 percent of all grocery sales, exceeding $250 billion, and more than 1 million American jobs.

The Robinson-Patman Act (RPA) was passed by Congress in 1936 to protect competition and ensure small businesses aren't subject to discriminatory terms of trade such as price discrimination. Unfortunately, this law is no longer enforced by law enforcement agencies – it has been more than 20 years since federal enforcers 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 agriculture producers 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

Pandemic-era disruptions and inflation pressures have made the grocery supply chain literally a kitchen table issue for the American people. Early in the pandemic, inconsistent distribution and apparent shortages of consumer goods staples 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. Inflation disproportionately impacts independent grocers because dominant grocery players use their negotiating power to resist inflationary cost increases and suppliers have no choice but to raise prices on their smallest customers at a higher pace. However, this is not just a symptom of the current era – it is the direct result of economic discrimination against smaller businesses allowed by a lack of antitrust enforcement and inadequate remedies. Independent grocers and the communities they serve are harmed in the following ways:

- Large firm "power buyers" leverage 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.
- Consumers generally pay higher prices under the status quo because the largest grocery players don't face robust price competition and can take more margin on products, especially in the local markets where they have obtained a dominant market share, and consumers have fewer choices.
- Consumers that live in rural or low-income food insecure areas that are typically serviced by independents are disproportionally impacted often paying higher prices and travelling longer distances to find the products they need at more crowded large chain retailers.
- Like many American small businesses, independent grocers have been put at a more severe economic disadvantage to their larger rivals in the current era of supply disruptions and inflation, a period when big box retailers and e-commerce giants have generated record profits.

Although supply disruption and inflation has exacerbated economic discrimination in the grocery sector, this phenomenon is not confined to this era. 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 ecommerce 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 packaging or package sizing can confuse consumers, who may mistakenly believe that independent grocers are charging more than big box stores for the same products.

Unfortunately, antitrust enforcers have not taken seriously increasing consolidation and as a result the supermarket industry has experienced a rapid acceleration in concentration of economic power. The merger of America's two largest conventional grocery chains, Kroger and Albertsons, will only make matters worse. Anticompetitive practices by dominant retailers will only worsen unless Congress or the antitrust enforcement agencies 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.

Position

Big Tech investigations by Congress and enforcement actions by 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 enforcers 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 reduce consumer prices and 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: Sponsor the Consumer Grocery Pricing Fairness Act

Congress should pursue legislative reforms that prohibit pernicious economic discrimination. The Consumer Grocery Pricing Fairness Act would amend the Clayton Act and take a targeted approach to addressing the inadequacies of current antitrust remedies by:

- **Prohibiting Economic Discrimination in the Grocery and Food Sector** – The bill prohibits dominant players in the grocery industry from engaging in price discrimination or imposing discriminatory terms of trade.
- **Promoting Clarity** – The bill draws a line between pro-consumer efficiencies that should be encouraged versus anticompetitive behaviors that harm consumers and competition (i.e. abuses of buyer power and economic discrimination without efficiency justifications).
- **Addressing Discriminatory Loopholes** – It prohibits exclusionary behavior that discriminates against entire retail channels like grocery (e.g., club and dollar store packaging).
- **Applying Only to the Largest Entities** – The bill would only capture anticompetitive conduct by the largest players in the grocery and consumer supply chain who have market power – not small and medium-sized businesses.