



National Grocers Association

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

I. Introduction

Mr. Chairman and Member Commissioners:

I am J. H. Campbell, Jr. President and CEO of Associated Grocers, Inc. in Baton Rouge, Louisiana. Since our inception in 1950, Associated Grocers, which is a retailer-owned company, has grown to over 260 independent retailers operating in Louisiana, Mississippi, Texas, Arkansas and Alabama. With over 750 employees and annual sales of over \$630 million, Associated Grocers is committed to the support and the success of the independent retail grocer. Associated Grocers operates a warehouse distribution center with over 600,000 square feet to procure food and grocery products directly from manufacturers for our members and customers.

I am also a past Chairman and a current Board Member of the National Grocers Association (N.G.A.). N.G.A. is the national trade association representing the retail

and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately-owned or controlled food retail company operating in a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. Some are publicly traded but with controlling shares held by the family and others are employee owned. Independents are the true entrepreneurs of the grocery industry and dedicated to their customers, associates and communities.

American consumers have benefited from the most diversified food distribution and supply system in the world, and independent retailers and wholesalers have historically been the cornerstone of that diversity, providing variety, selection, competitive prices, and value for the consumer. Independent retailers and wholesalers play a critical role in preserving a competitive, diversified marketplace that significantly benefits the American consumer. That is why it is imperative that we preserve a competitive playing field that is fair and equitable without barriers to entry. N.G.A. and its predecessor organizations have a long history of support for the Robinson-Patman Act and its goals and objectives.

Those of us who have worked with independent retail grocers have done so because of our tremendous admiration for their persistence, fortitude, and desire to be of service to the consumer. They are the legitimate shopping alternative that insures, for the consumer, product variety and selection. This inspiration further causes us to commit to the maintenance of a fair and open marketplace whereby they can compete with any and all competitors, and allow the consumer to freely choose the business entity from

whom they secure their desired goods or services. My purpose here today is to share with you my experiences with the Robinson-Patman Act, both as the chief executive officer of a distribution company and as an industry spokesman that has fought for parity and equity for independent retail grocers for twenty-five years.

II. Fairness and Diversity Matter

I will not try to review for you the complete history of the Robinson-Patman Act, since you probably know it only too well. The March 31, 1936 report of the House Judiciary Committee emphatically stated that “The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against the restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.”

Wright Patman, in his book on The Robinson-Patman Act, stated it simply in 1938 that “Essentially the present act provides that when a man sells a product to two or more customers who are in competition of the resale of that product, he must not discriminate between them in such a way that one is given an unfair advantage over the other.”

These principles of equality of opportunity have been embodied in the law for almost 70 years and remain true and equally important today.

The equality of opportunity in business is like sports. Teams and players, seek fair competition. The rules should not necessarily make a player a winner. The rules

should provide the player a fair chance to compete against the other side. Rules of engagement give each player the same fair chance to be a winner, if he has the ability to be one, and if he performs well enough on the field of play.

In response to the Department of Justice's attacks on the need for the law in 1975, N.G.A.'s predecessor, the National Association of Retail Grocers of the United States, and nineteen other small business associations effectively rebutted the Department's arguments in "The Robinson-Patman Act: Equal Opportunity or Price Discrimination-Which Will It Be?"

"In judging the public need for the Robinson-Patman Act, one central fact stands out. Special allowances, discounts, rebates, and other forms of price discriminations are invariably received by buyers with superior market power. Small firms, including those entering a market for the first time, are rarely the recipients of discriminatory price reductions. Price discriminations confer greater advantage on firms already advantaged by superior market power and tends to harm the competitive system by causing further concentration of economic power.

Price discrimination favoring larger concerns in a market have the effect of handicapping new smaller competitors. Size and power, rather than services and efficiency, become determinants of economic success."

In fact 30 years ago, those small business organizations concluded that critics of the law had already succeeded in substantially undermining public enforcement by the Federal Trade Commission and the Department of Justice. They predicted that voluntary compliance would suffer as well.

Since its inception in 1982, N.G.A. has devoted significant time to educating and informing law makers and federal agencies on the need to preserve diversity in the marketplace for the benefit of the American consumer. Numerous times in the last two decades, N.G.A. has met with members of the Federal Trade Commission and staff. In April 2000 N.G.A. conducted store tours with the staff of the Bureau of Competition to illustrate the discriminatory demands and preferential treatment granted to power buyers in pricing, promotional allowances, packaging, product availability, and payment terms. In September 2000 N.G.A. conducted a briefing with FTC commissioners and staff on the growing concentration in the grocery industry and the adverse effect that the discriminatory treatment in favor of power buyers have on consumers. In September 2002 N.G.A. met with Chairman Tim Muris and other Commissioners to once again discuss the need for Robinson-Patman Act enforcement.

Within the historical context of the Robinson-Patman Act it is widely known that it was enacted in response to anticompetitive practices of the Great Atlantic and Pacific Tea Company. Today the Robinson-Patman Act remains equally important in maintaining a level playing with Wal-Mart and other mega mass merchandisers and/or mega-chains. The scale and magnitude of the economic power of Wal-Mart dwarfs any other buyer. Wal-Mart for fiscal year 2005 had sales of \$285 billion dollars (reportedly bigger than the Gross Domestic Product of 161 countries) and over \$10.2 billion in net income. For the coming year Wal-Mart plans to add 250 more Supercenters, 45 new Discount Stores, 40 new Sam's Clubs and 30 new Neighborhood Markets in the United States, and forecasting room in the U.S. for 4,000 more Supercenters. This is in addition to the 1,353 Discount Stores, 1,713 Supercenters and 85 Neighborhood Markets that exist

today. One economist recently predicted that by 2010 that Wal-Mart would dwarf conventional measures of the national retail trade and represent 3.6 percent of the gross domestic product (GDP), leading the FTC to have to look at domestic market disruptions as Wal-Mart exerts greater influence on prices, competition, employment and supply chains.

It is our view that in the rush to achieve “bigness” and “scale”, many, if not most, of the mergers during the 1990s in the grocery industry were the result of factors, justified by the perceived need by the large supermarket chains to achieve “buying parity” with Wal-Mart. Another reason was the enforcement attitude (or lack thereof) of the Federal Trade Commission: it permitted the creation of a new generation of power buyers, and levels of concentration in grocery retailing never before seen in this country. At the same time, these chains benefited from the FTC’s almost total abandonment of Robinson-Patman enforcement, leaving no governmental oversight to their exercise of newly-obtained buying power. This environment permitted mega-chains to use their buying power to make unreasonable and discriminatory demands upon the supplier community. These preferences occurred in pricing, packaging, payment terms, and conditions of product availability. As these preferences or discriminatory advantages occurred, it afforded the major competitors the opportunity to continue to grow and garner more market share. And not surprisingly, the mergers at the retail level and the demands of the mega-chains that those mergers created, set off a counter-reaction at the grocery supplier level: another round of mergers involving the largest grocery manufacturers in the country. Again the FTC has been reluctant to restrain the dramatic increase in concentration at this level of the supply chain and the barriers to entry that have been created. These increases in concentration are

threatening the diversity in the marketplace and the consumer choices that have been the hallmark of the American grocery industry and marketplace. The recommendations of this Commission should – *must* – address these concentration and power-buyer problems and the dangers they pose to competition and diversity in the marketplace.

Let me make it clear that we are not seeking any special treatment or preference for independent grocers. In fact N.G.A., as does most of the food industry, strongly believes in voluntary compliance with the law rather than regulatory enforcement. Our basic concern, as any wholesaler and independent retailer in the marketplace, is to be certain that we are receiving the same price offerings, deals, allowances, promotions and/or packaging and payment terms that are being made available to any other competitor in the marketplace at the same time. Quite often we and independent retailers have found that we have not been able to receive the same price, deals, promotions or packaging on a particular item or category of items from a particular manufacturer. In our meetings with the FTC and in submissions to the Commission, we have attempted to document potential violations to no avail for FTC oversight.

As a result, I and other executives in the industry are left to use the Robinson-Patman Act to fight for fair treatment in the marketplace, most often after the fact to receive the offerings of our competitors. It can take weeks or months to resolve so that the consumers of our independent operators are no longer disadvantaged by not being offered the same products, packaging, promotion or most importantly competitive prices and payment terms.

With technology today, it should be much easier for any brand manufacturer to make known an offering to any and all sellers of their products so buyers can have the information on an equal and timely basis. The Robinson-Patman Act is one of those rules of engagement whereby all competitors, regardless of the format in which they operate, or the classification of trade in which they are viewed, (but who have the commonality of purpose of trying to sell to the ultimate consumer), have available to them the same objectively determined products, packages, promotions, pricing, and payment terms. When this occurs, each can compete in the marketplace without barriers to entry, and with the opportunity to succeed or fail based upon their ability to meet consumer's desires for either those products or services offered.

The rush to "bigness" or "scale" on the part of mega chains and discounters is in many respects driven by the lack of enforcement of Robinson-Patman, resulting in power-buyers making excessive demands on suppliers with respect to special pricing, packaging, promotional allowances, payment terms, and product availability. The Robinson-Patman Act is essential to ensure all competitors are being offered and receiving the proportional and equal pricing, packaging, promotional allowances, product availability, and payment terms. The ability of large power-buyers to demand and receive special preferential treatment in any of these five areas that are not made available to competitors violates the law and fuels the fire for power-buyers to seek even more buying clout through mergers and acquisitions. In the absence of FTC enforcement, the existence of the law and the potential threat of private action only serves to provide some limited leverage to level the playing field and then only, after the fact, when the damage has been done.

Examples cited to the FTC included the offering of product promotions, packaging and coupon rebates to club stores that were not being offered to competing retailers; providing discriminatory prices and allowances to mega chains; and giving extended payment terms or “pay on scan” that are not offered to other competitors.

The Fred Meyer guidelines provide that there should be no class of trade distinction between the grocery industry and mass merchandisers, a change which N.G.A. directly recommended. This position has been reinforced by a prior director of the Bureau of Competition, yet time after time, retailers are able to cite examples of special packaging and products that are made available to Wal-Mart, the clubs and or/discounters that are not offered to the traditional retail grocery industry. N.G.A. believes strongly that for purposes of Robinson-Patman, formats such as traditional Wal-Marts, Targets, clubs, K-Marts, and chain drug stores are not different classes of trade, and should not enjoy preferential treatment that is not made available to competing retail grocers. The consumer does not check for format or class of trade when the purchase decision is made. The consumer seeks product availability and accessibility at a competitive, and or fair price, at a convenient location.

III. Voluntary Compliance Recommendations

As far back as 1992 N.G.A. proposed to the industry nine points of fairness consistent with the Robinson-Patman Act in order for independent retailers and wholesalers to have access to a level competitive playing field. These points involved equal access to

products and packaging, terms, pricing equality, full product lines, and distribution systems.

In summary some of those recommendations included that full disclosure of all products and all packing of those products on printed price lists (now electronic) should be made available to all competing distributors in a relevant geographic market. This includes listing of special banded packs of individual consumer packings, special sizes, “test” products, and regular access to whatever sales organization may be authorized to represent those products.

Time within which to pay for merchandise and earn a cash discount or other concessions having a monetary value (although not necessarily stated in dollars or percentages of price), should be the same for all competing customers, regardless of retail format or class of trade and should not be based upon the demands of a relatively few large customers. When payment terms depend on a customer's technological capability, information about the technical requirements should be made available to all customers and the terms, e.g., “pay on scan”, should be extended when the technical (objective) requirements or reasonable alternatives have been met by any and all competitors.

Suppliers should evaluate their practices to: 1) assure consistency in pricing of common products whether sold individually or in multiples when examined on a price-per-unit basis; 2) include the added cost of special packings or handling in the price to the purchaser of the product; 3) equalize values of promotional allowances versus “net pricing” practices that do not require promotional performance; and 4) assure that price reductions resulting from the elimination of services are available to competing customers. It is essential that suppliers not yield to demands of power buyers for

preferential treatment that result in any form of discrimination under the Robinson-Patman Act.

Manufacturers should not attempt to “justify” lower prices and special terms of sale to classes of trade or retail format that carry only a “limited selection” of products and package sizes or that purchase only “on deal”, by comparing their costs and profits on sales to traditional retailers that do carry the “full line” of that manufacturer’s products on a year-round basis. Such a justification fails for three reasons: (1) It does not recognize the contributions to the manufacturers’ overall cost and profit structures of having a stable channel of distribution for the full product line, for new products, and for local, regional and national promotional efforts; (2) it is unfair to the full-line retailers and perhaps is illegal as well; and (3) that discrimination threatens to reduce the product choices available to consumers by making it economically impossible for some supermarket operators to continue to stock a full line of products which the American consumers seeks and desires.

IV. Specific Recommendations on Issues Raised by the Commission

1. The Robinson-Patman Act should not be repealed. It is an integral part of the fabric of U.S. antitrust law, which is designed to give the American consumer the widest variety of products of the highest quality at the lowest price. Competition is what makes the system work, and we have a tradition, enshrined in the antitrust laws, to assure that competition in the marketplace is fair, and that whether a firm succeeds or fails depends on its efficiency and ability to fulfill consumer needs, more than on its size and its ability to obtain unfair advantages over its competitors. Efficiency and

marketplace diversity are critical. Efficient firms use their lower costs to give their customers lower prices. Diversity assures consumers a wider choice of where they shop, the products that are available, the quality of those products, competitive and fair pricing on those products, how they are packaged and the myriad other factors that enter into the purchasing decision. Robinson-Patman helps maintain diversity in the marketplace by preventing price discrimination that is not justified by buyer efficiency. Thus, Robinson-Patman Act (R-P, hereafter) *does not* protect inefficient retailers; it encourages them to become more efficient so that they can obtain lower prices and be more competitive. The Robinson-Patman Act is the only significant restraint in our antitrust laws on the ability of power buyers to obtain preferential treatment from their suppliers, treatment that is based on size or negotiating prowess, rather than efficiency.

The Robinson-Patman Act is the only federal antitrust law that focuses on pricing fairness among competing resellers, and determining Robinson-Patman violations under other federal laws would be extremely difficult, if not impossible. The result of repeal of this Act, or any serious weakening of it, would quickly lead to further concentration at all levels of the food distribution chain; with that would come drastic reductions in diversity in the marketplace, and consumer choice would be limited to what the few remaining mega-retailers find most profitable. As the number of retailers declines, prices will rise, and selection and variety of product offerings reduced. Some have suggested that sections 2(d) and 2(e) be amended to require proof of competitive injury to establish a violation. N.G.A. flatly opposes any such amendment because it would serve as an even greater impediment to private parties being treated fairly and establishing a Robinson-Patman violation, all to the detriment of consumers.

2. Services should be covered by the Robinson-Patman Act. All businesses purchase services, but providers of those services are not subject to the requirements of the Act. Yet, the cost of some services, especially to retailers, has become an increasingly significant cost of doing business. Discrimination in the cost of securing those services can confer tremendous competitive advantages on power "users" of the services. The cost of interchange charged to retailers who accept debit and credit cards as forms of payment by consumers illustrates the problem. In its comments to the Joint Workshop on Merger Enforcement held by the FTC and the Antitrust Division of the Justice Department in February, 2004, N.G.A. described the problem as part of its discussion of power-buyer issues (at pages 8-10).

"The buying market power problem is not limited to the prices that retailers pay for products to be resold to consumers. Many of the *services* purchased by grocery retailers represent significant costs of doing business. The advantages of buying power in this area are illustrated most vividly by the fees paid by grocers to Visa for various electronic fund transfers (EFT). In an apparent attempt to dominate the PIN debit¹ segment of the EFT market, Visa announced a new debit fee schedule, which took effect on January 31, 2004.² But, according to reports in the financial press, Visa has also entered into private agreements with some of the country's highest volume retailers that reduce those retailers' transaction costs below the

¹ PIN (personal identification number) debit, or on-line debit transactions are those in which the customer enters a PIN in a key pad at the point of sale. No signature is needed. The other type of debit transaction is the signature, or off-line, debit transaction, which uses a process similar to that used for charge purchases, including a receipt signed by the customer. Concord EFS (in the process of being acquired by First Data Corp.) is the largest processor of PIN debit transactions. The signature debit sector is dominated by Visa, which also dominates the credit card segment of the EFT market.

² These fees are somewhat higher than those charged by Visa during the previous five months, following the settlement of a suit brought by Wal*Mart and many other retailers against Visa and MasterCard. The new fees are lower, however, than those in effect prior to the settlement of the private litigation. As part of that settlement, Visa agreed to an interim price reduction for PIN debit transactions. It also agreed to discontinue the "honor all card rule," which forced retailers that accepted Visa's credit cards also to accept its debit cards, mainly signature debit cards.

new publicly announced schedule. It is widely believed that those agreements, such as one with Wal*Mart, reduced transaction fees on all types of Visa card payments, signature and PIN debit, as well as credit card transactions.

The result of these special deals for the largest grocery chains has widened the cost-of-doing-business gap between retailers with buying side market power and the rest of the retail grocery industry. Currently, this cost differential is one of the critical issues facing independent grocery retailers, as well as other large grocery chains that operate on a local or regional basis. Industry estimates place the cost of debit and credit transaction fees at .5% of sales in supermarkets, a cost that exceeds the net profits of some retailers, and represents between 25% and 50% of profits for most others. Because the use of plastic, especially PIN debit, is growing dramatically in supermarkets, the disparity in costs of transaction processing service places the majority of supermarket firms at an unfair competitive disadvantage.

There is another aspect of this situation that warrants examination – the question of whether there are any real savings in the cost of servicing these largest retailers, as opposed to the cost of serving others, savings that would arguably justify lower transaction costs, including interchange rates,³ to customers like Wal*Mart. It appears that the overwhelming amount of processing costs are *fixed*, rather than *variable* costs.⁴ Assuming that a processor has sufficient volume to cover its fixed

³ Interchange rates represent the largest portion of total transaction fees paid by retailers. Interchange rates are set by the credit card associations, such as Visa and MasterCard. Processors collect the interchange fees from the retailers and transmit them to the credit card associations.

⁴ N.G.A. is indebted to members of the processing community for their cooperation and candor in answering questions about processing costs, fees and related issues. Discussions were held on the promise of anonymity.

costs, processing additional transactions add virtually nothing to the cost of doing business..⁵

Variable costs do exist in the processing stream, but their amounts are, at most, minute. In some instances, variable costs might include communication services, which often are not based on the number of transactions at all, but on the time the communications system is used. Other examples of variable costs can include software licenses and outsourcing costs. However, one source stated that its total variable costs are well below one cent per transaction. What we have, therefore, is a predominantly fixed-cost-per-transaction system in which retailers are charged for processing, at least in part, based on their size – the number and dollar value of the transactions to be processed. There is no difference in the cost of processing a transaction that is related to the size of the retailer in which the sale occurred, or to the dollar value of the transaction processed.⁶ The cost of processing a \$5.00 transaction from a one-store grocery operator is the same as the cost of processing a \$5,000.00 transaction from a Wal*Mart outlet. And there is no additional transaction-based cost for processing transactions generated by a new retail customer. Therefore, we see no rational justification for lower prices to high volume retailers, like Wal*Mart. The number of transactions to be originated, or

⁵ This statement further assumes that the processing system is not operating at its transactional capacity. Should additional transactional volume require additional investment, that cost would also be a fixed cost, not a variable cost.

⁶ Virtually all fees in this country have a component that is based on the dollar value of the transaction. For example, Visa's most recently announced fee schedule, effective January 31, 2004, establishes a cost for supermarkets on POS debit transactions of 1.23% of the value of the transaction. On a \$40.00 purchase, this amounts to \$0.48, and \$1.23 on a \$100.00 purchase. Despite this percentage formula, however, Visa caps the charge to supermarkets at \$0.35, regardless of the size of transaction size. Perhaps the only area in which it can be argued that there is a relationship with the size of the transaction is the risk factor, especially in the use of charge cards. But the risk of fraud falls on the banks, not the transaction processors.

their value, does not reduce the processor's dollar cost on a per-transaction basis.⁷"

The data in the above excerpt are somewhat out of date, but the problem of leaving services beyond the reach of our price discrimination statute is clear.

3. The FTC should be required to resume enforcement of the Robinson-Patman Act. Decades have past without any significant R-P enforcement activity by the FTC. It dismissed a case some years ago against a number of book publishers, because a private suit had been instituted. The FTC case would have resulted in an injunction against further discriminatory conduct. The private suit was settled for money damages, and the publishers escaped any future restrictions on its conduct. One must go back decades to find the last litigated order issued by the FTC in an R-P case. The new enforcement initiative should not resume the practice of suing discriminating sellers. The emphasis must be, as it always should have been, active and aggressive oversight of power buyers, who, after all, were the reason the statute was enacted.

Renewed enforcement efforts by the FTC, focused on power buyers, is not sufficient by itself to deal with the power-buyer problem. The other part of the problem is the commonly accepted analysis of mergers, which has focused solely on the selling side of the equation: if the "merging grocers" do not compete in the same geographic market(s), no issue is presented and the merger goes through without a question being asked. Merger analysis, especially in the case of retail mergers, must include a

⁷ The EU has recognized the "disconnect" between transaction fees and processors' costs, and has ordered drastic reductions over a five-year period on all cross-border transactions. Interchange rates on debit transactions will have to be at a fixed rate; no portion of the fee can be based on the value of the transaction.

buying-side analysis in order to determine whether the merger will create or entrench a power buyer. It is only when the creation of new power buyers, or the strengthening of existing power buyers, is prevented at the merger stage that we achieve effective protection of marketplace diversity and consumer choice.

A “buying-side” analysis has never been a serious consideration subject in governmental merger reviews under Section 7 of the Clayton Act. As mentioned, FTC enforcement of Robinson-Patman has been non-existent for decades. The marketplace has not self-corrected the problems that this inaction has created. Today’s retail grocery market in this country is the most concentrated it has ever been, and most of that concentration increase has been the result of mergers and acquisitions that required only token divestitures to gain FTC approval. At the same time, the agency’s R-P Act powers were never exercised to deal with the buyer power matter that their merger policy had created. The power-buyer problem today is more serious than it was in 1936, when the R-P Act became law. This trend must be stopped, and this Commission must do everything in its power to assure that it is.

4. Finally, N.G.A. offers for your consideration a recommendation in keeping with the purpose of this Commission, one that will modernize the philosophic approach to the purpose and enforcement objectives of antitrust: Redefine the purpose and focus of antitrust from increasing consumer welfare to preserving marketplace diversity and consumer choice. By this change, a number of unaddressed problems will receive the attention of the antitrust agencies and the courts. For example, analysis of buying-side concentrations will become a necessary element of merger analysis; today, the sole issue is the selling side, and if the merging parties do not compete in the same geographic market, no questions are raised, and a power-buyer may be created or

further entrenched. Today competitors are national and global, not just regional or local in nature or in economic strength.

V. Conclusion

The Robinson-Patman Act was enacted to preserve the level playing field between buyers and sellers. At a minimum, the law as written serves as a deterrent against unfair and illegal behavior. Unfortunately, the lack of enforcement, and/or of any public policy recognition by the FTC of the law, has helped accelerate the rush to “bigness” and “scale” in a business environment in which sheer size influences buyer/seller decisions. Excessive demands by power-buyers for special pricing, allowances, terms, packaging and services are unfair and illegal. The FTC should enforce the Robinson-Patman Act on a consistent, uniform and timely basis.

Artificial class of trade distinctions should be eliminated. The clubs, supercenters, traditional Wal-Marts, Targets and K-Marts and drug stores compete directly with independents and should not be afforded any class of trade advantage or preference.

In conclusion, consumers benefit from diversity in the marketplace. The Robinson-Patman Act provides for the equality of opportunity among competitors, including independent retailers and wholesalers, that benefits consumers by providing variety selection, competitive prices and value.