CENTER FOR Science IN THE Public Interest

The nonprofit publisher of Nutrition Action Healthletter

February 19, 2021

VIA ELECTRONIC MAIL

The Honorable Rebecca Slaughter, Acting Chair
The Honorable Rohit Chopra, Commissioner
The Honorable Noah Phillips, Commissioner
The Honorable Christine Wilson, Commissioner
Ian Conner, Director, Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20530

Re: Request to Investigate Trade Promotion, Category Captain, and Online Retail Practices in the Grocery Retail Industry

Dear Acting Chair Slaughter, Commissioners Chopra, Phillips, and Wilson, and Director Conner:

The Center for Science in the Public Interest (CSPI)[1] requests that the Federal Trade Commission (FTC) investigate trade promotion, category captain, and online retail practices in the grocery retail industry. These practices impact competition in the grocery aisle, dictate the choices available to consumers, and undermine the health of millions.

The grocery retail sector is characterized by cozy contractual arrangements that enable leading brands to control entire aisles of the store. Manufacturers spend 70 percent of their advertising budgets on trade spend to ensure their products occupy premium store spaces.[2] At the same time, category captains—representatives from brands that dominate a specific food or beverage category—dictate where their own, the store brand, and competitors' products appear. And these practices are increasingly migrating online, with prime placement on shelves replaced with premium placements in search results and targeted marketing fueled by personalized digital data.[3]

These grocery retail practices drive up entry costs and cede control of critical retail decisions to leading brands, placing smaller manufacturers and fruit and vegetable producers at a disadvantage in the marketplace. For example, farmers who cannot afford trade promotion fees typically cannot place products in prime store locations, such as end-of-aisle displays. These fees are one reason that healthier foods, such as fruits and vegetables, rarely appear outside the produce section or in the most trafficked areas of the store.[4] As a result of these practices, unhealthy, processed products like chips and soda dominate the physical and digital grocery store. To eat healthily, consumers must intentionally disregard incessant cues, nudges, and incentives, fighting an uphill battle every time they enter the grocery store.

Grocery retail practices are ripe for re-examination. The FTC last investigated trade promotion practices in 2003, and then only focused on the narrow issue of slotting fees and reached no concrete recommendations. To our knowledge, the Commission has never investigated online marketing practices for food retailers.

The significant changes in the marketplace since the FTC's prior investigation of food retail practices suggest the need for a new, broader, and deeper investigation. Since 2003, category captain arrangements have become the norm and manufacturers have continued to spend an increasing proportion of their advertising budgets on trade promotion.[5] At the same time, online grocery platforms are rapidly developing. In January 2020, the Food Marketing Institute (FMI) estimated that by 2025, online grocery sales will reach $143 billion in sales.[6] That projection, which came prior to the pandemic, is likely conservative,[7] especially because the U.S. Department of Agriculture recently enabled nearly 35 million Supplemental Nutritional Assistance Program (SNAP) participants to use their benefits online.[8]

CSPI encourages the FTC to use its subpoena power under section 6(b) of the FTC Act to compel retailers to produce information regarding in-store and online practices. CSPI further requests that the FTC publicly report its findings regarding retailers' in-store and online trade promotion, category management, and personalized data use practices. Such a report would be a useful source to inform guidelines that protect consumer interests in choice, competition, and health. By curbing anticompetitive practices that harm smaller food brands, fresh fruit and vegetable producers, and the consumer, the FTC can also correct for public health harms that these practices exacerbate.

Below, we explain why an FTC investigation of food retail trade practices is both necessary and timely. In the first section, we describe specific ways in which grocery retailers' trade promotion, category captain, and online retail practices threaten competition. In the second section, we detail the impact these practices have on health. The third section outlines why the time is ripe for the FTC to investigate grocery retailer's practices. The final section suggests the specific elements on which the FTC should focus its investigation.

I. Food Retailers' Trade Promotion, Category Captain, and Online Retail Practices Pose Antitrust Concerns

A. Trade Promotion Practices

Trade promotion practices are arrangements in which food and beverage manufacturers pay grocery retailers to promote and place their products. These arrangements have a profound impact on the food environment, and consequently, on market fairness and public health.

Trade spend contracts, which the industry refers to as cooperative marketing agreements (CMAs), are typically voluminous documents that specify expectations for retailers regarding the promotion, placement, and pricing of a manufacturer's product. In exchange for these promotional activities, manufacturers pay substantial fees to retailers, including in the form of "slotting fees," "staying fees," "display fees," and "free fill."[9]

CMAs determine which products retailers sell and how visibly they market the products in stores and online. To influence consumer decisions, CMAs typically dictate the amount of space allocated to a particular product; specify where in the store a product is featured; require retailers to “cross promote” or market certain foods together; determine the number of free items manufacturers will provide; and allow retailers to provide price promotions.[10]

Trade promotion practices have a significant impact on consumer purchasing behavior. For example, shelf space, in and of itself, has a promotional effect.[11] Prime locations, such as the middle shelf, checkout aisle, or aisle end, can also increase purchases.[12] Checkout, in particular, is one of the locations most likely to prompt purchases: this area can be eight times as profitable per square foot as other parts of the store.[13]

The details of such trade promotion agreements are largely unavailable to the public. But a portion of an apparent CMA from 2012 between three outlets of a grocery store and a manufacturer of sugar sweetened beverages that we have viewed provides some indication of how these contracts curb retailers’ independence, dictate the retail environment, and manipulate consumer choice.[14]

For $45,566, or roughly $1.35 per case sold, the three stores agreed to meet requirements favorable to the manufacturer for cold storage, in-store displays, and advertising in store circulars. Specifically, the CMA required the retailer to:

- Stock two of the manufacturer’s products for every one of its primary competitors in coolers. For self-checkout aisles, the CMA required that the manufacturer’s products comprise at least 50% of the cooler space.

- Feature the manufacturer’s products in displays every week of the year, and include its products on end caps, on “shopper occasions” (holidays), in island racks, and other miscellaneous displays; and

- Dedicate a percent of store circular advertising to the manufacturer’s products.

Arrangements like these are not an anomaly; they drive the market. Trade promotion practices are so effective at compelling impulse purchases that manufacturers now spend twice as much on in-store product promotion as on traditional advertising.[15] Given that trade promotion involves such high entry costs, trade promotion practices can disadvantage smaller manufacturers and fruit and vegetable producers, making it more difficult for them to introduce new products or expand the market of their existing products.

It has been estimated that getting a new product into a national chain can cost between $1.5 to $3 million.[16] When retailers demand fees that only dominant suppliers can afford to pay, it effectively forecloses competitive opportunities for alternative suppliers and decreases consumer choice.

B. Category Captain Arrangements

Category captain arrangements are another practice that has gained traction and given food and beverage manufacturers increased control over the retail food environment. In category captain arrangements, retailers outsource key decisions about product pricing, placement, and promotion to the dominant manufacturer in a given food category (*e.g.*, bread).[17]

In a typical category captain arrangement, retailers provide the category captain all relevant data on the category, including other manufacturers' prices, unit sales, and promotional plans.[18] The category captain uses these data to, among other things, create a detailed drawing of the shelf layout, known as a "planogram," which determines where on the shelf, and in how many slots on the shelf, its products and competitors' products appear.[19] Retailers charge manufacturers a fee for the right to serve as the category captain, frequently requiring category captains to invest in specific databases for the retailers' benefit, and may require captains to use their own resources to directly manage the shelf space.[20]

By providing the category captain access to competitors' insider information and ceding it extensive authority, retailers virtually ensure critical retail decisions favor the captain's brands at the expense of their rivals or potential rivals, raising serious antitrust concerns. As former FTC Commissioner Thomas Leary said in 2004, "the idea [of category captain arrangements] . . . set off every antitrust alarm" and, despite arguments about the arrangement's competitive benefits, "still . . . present high antitrust risks."[21]

C. Online Retail and Personalized Data Collection Practices

The food retail industry's increasing utilization of online shopping and marketing poses new challenges as well as a variant of some of the anti-competitive practices that have long existed in brick-and-mortar grocery stores.

In the online retail environment, prime placement on grocery store shelves is replaced with premium placements in search results or on landing pages, banner ads, pop-ups, and email promotions.[22] Companies like Hershey, for example, have encouraged retailers to include a host of digital promotions on the checkout page. The manufacturer's suggestions included a "just add Hershey's" feature to earn free shipping and pop-ups to advertise products like chocolate chips when orders include baking ingredients.[23]

Trade promotion practices are thus playing out online as well, with larger food and beverage companies paying retailers to prominently price, place, and promote their products within results. Like its in-store relative, these practices disadvantage newer, smaller companies in the marketplace, making it more difficult for them to introduce new products and brands.[24] These practices also raise the risk that consumers are deceived, as consumers expect that search results are ranked based on relevance to a search query, not on hidden payments by a third party whose products are for sale.[25]

Technology has also evolved to allow retailers to better collect and use personalized digital data. Specialized software can track an individual, analyze behavior patterns, and develop a unique profile, allowing companies to tailor marketing to that person.[26] Targeted marketing technology allows marketers to mine customers' purchase and search histories, meaning that an individual's one-time purchase can become the basis for an ongoing promotion. As one Hershey executive put it: "Once that customer buys one of our snacks, it'll likely stay on their pre-loaded list for the next purchase—and we move that unplanned 'impulse' purchase into a planned one."[27]

Large companies have greater resources to take advantage of this emerging technology, allowing personalized digital data to feed into and enhance the anti-competitive impact of trade promotion practices and category captain practices. Personalized data can also power deceptive online practices. Use of personalized data raises important questions around consent, specifically "what users are agreeing to do and share online, and how far businesses can go in leading them to make decisions."[28]

II. Grocery Retail Industry's Practices Impact on Health

As of 2015, 90 percent of Americans—SNAP participants, food-insecure individuals, and higher-income customers—do their usual food shopping at a grocery store or supercenter.[29] Grocery stores are the top source of foods and beverages, providing more than 60 percent of a household's weekly calories, on average.[30]

Though grocery stores offer for sale a wide range of healthy products, they also are the source of a majority of the unhealthy foods and beverages in Americans' diets. Approximately 70 percent of the sugary beverages children drink come from food retail.[31] Grocery stores are also adults' primary source of sugar-sweetened beverages and unhealthy snack foods.[32] In one national chain, which uses a nutrient profiling system that awards zero, one, two, or three stars to indicate the healthfulness of products, only 24 percent of in-store products qualified for even a single star.[33]

The market imbalance created by the grocery retail industry's practices discussed in this letter have a significant impact on the unhealthful offerings in grocery stores. Simply put, when big soda and snack companies control supermarket space, unhealthy foods dominate. One study found that the more grocery stores promote less-healthy items in key locations, the less money shoppers spend, proportionally, on fruits and vegetables.[34] Another study of in-store placement and promotion found that, on average, sugary drinks appear in 25 and unhealthy foods in 40 different places across the grocery store, but healthy foods like fruit and vegetables appear in only one section.[35]

Online, the use of contracts and fees to promote food and beverage products can also have an outsized impact on consumers' choice. From the online scan CSPI conducted, we know that more than half of products promoted on retailers' websites are unhealthy, and only 24 percent of emails that retailers sent were for healthy products.[36] Product promotions are not the only way online retailers push unhealthy products; retailers also use price and search results that encourage unhealthy purchases. In our scan, online retailers offered greater discounts for unhealthy versus healthy products. They also prioritized unhealthy products in search results. When CSPI evaluated the first three products that appeared in the search results for five staple categories (milk, bread, cereal, drinks, and chicken), we found that more than half were unhealthy.[37]

Thus, the practices of the retail food industry not only dampen competition, stifle innovation, and result in less choice in the food aisle, they also play an enormous role in the healthfulness of food choices available to consumers.

III. <u>Need for Investigation</u>

The FTC has no policies or rules to counter the risk food retail practices pose to competition and public health, and it lacks sufficient, up-to-date information concerning these practices to develop informed policy.

Although the agency has investigated issues related to online retail in general,[38] the FTC has yet to examine online food retail or how industry uses personalized digital data for food marketing purposes. The FTC has twice previously considered food retail practices. In 2000, the FTC conducted a public workshop on marketing practices in the grocery industry. The workshop resulted in a 2001 report, but reached few conclusions other than recommending that more research be undertaken and that the FTC refrain from issuing industry guidance at that time "when much remains to be learned."[39] As the report explained, the workshop "could not and did not, resolve all the questions" and, as the details of these marketing practices are "competitively sensitive," it appears large manufacturers declined to participate and the discussion "necessarily had to be general."[40]

In 2003, the FTC conducted a case study of slotting fees in five product categories.[41] To conduct the case study, the FTC sent a voluntary request to nine retailers (of which seven responded) asking for data, documents, and responses on the retailers' slotting fees.[42] This case study was narrowly focused on slotting fees; made general findings about the frequency of slotting fees utilization (as high as 90%), their costs (between $1.5 million and $2 million for a nationwide introduction of new product), and retailers' justifications for requiring them, and again resulted in no concrete recommendations.[43]

In short, these two efforts only scratched the surface of the many serious issues raised by food retailers' practices and did so at a time when online purchases were much less common than they are today. There is an urgent need for the Commission to re-investigate grocery sector practices both in-store and online. The increasingly pervasive practices of trade promotion and category management, when coupled with personalized data collection, have the potential to threaten competition, limit consumer choice, and, ultimately, harm public health.

IV. Request for Investigation

Section 6 of the FTC Act grants FTC the authority to undertake investigations of general industry practices. These provisions give the Commission a variety of methods to obtain information, including the power to issue civil investigative demands. Section 6(b) enables the FTC:

> [t]o require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce . . . to file with the Commission . . . reports or answers in writing to specific questions, furnishing to the Commission such information as it may require . . . .[44]

As a first step, we request that the FTC issue a Section 6(b) request for information on trade promotion, category management, and online retail practices in the grocery retail sector. In particular, the FTC should compel grocery retailers and/or food and beverage manufacturers to provide information that includes:

(1) An identification of all food and beverage manufacturers with which retailers have trade promotion and category management agreements and the brands and products covered under those agreements;

(2) A description of the various in-store and online trade promotions offered by retailers and information sufficient to understand the fees received from manufacturers for these trade promotions by promotion form and product category;

(3) A description of the retailers' category captain arrangements, including the manner in which the retailer selects category captains and the specific division of various category decisions between the retailer and category captain, a description of controls that a category captain exercises over in-store arrangements, including placing, promotion and pricing, and an estimation of the dominance of category captains by market share within the relevant category;

(4) Representative examples of trade promotion and category management agreements;

(5) Acquisition, sale, and use of consumer data and its impact on trade promotion, category management, or other decisions, including:

(a) the source(s) of each type of personal data;

(b) the procedures or means by which each such type of personal data is collected, generated, or derived;

(c) whether and how the company acquires the consent of consumers before obtaining, generating, disseminating, and/or storing the personal data of said consumers; and

(d) how the company uses these datal; and

(6) Information sufficient to show grocery retail sales by product category, the market share of major food and beverage manufacturers by product category, and the market share of major grocery retailers in the grocery sector, including sufficient historical and other necessary data on such figures to perform a trend analysis.

CSPI further requests that the FTC publicly report its findings regarding retailers' in-store and online trade promotion, category management, and personalized data use practices; and that the report discuss these practices' impact on the fairness of the marketplace, the range of consumer choices, and public health. Such a report would be a useful source to inform guidelines that protect the consumer interest in choice, competition, and health.

V. Conclusion

CSPI requests that the FTC investigate and issue guidance concerning trade promotion, category captain, and online retail practices in the grocery retail industry. These practices impact competition in the grocery aisle, dictate the choices available to consumers, and undermine the health of millions. By curbing anti-competitive practices that harm smaller food brands, fresh fruit and vegetable producers, and the consumer, the FTC also has an opportunity to address the public health harms that these practices exacerbate.

We would be pleased to discuss this or related issues with you at your convenience.

Respectfully,

Peter Lurie, M.D., M.P.H.
President and Executive Director
Center for Science in the Public Interest

Laura MacCleery, J.D.
Policy Director
Center for Science in the Public Interest

---

[1] CSPI is America's Food and Health Watchdog, a non-profit consumer education and advocacy organization that has worked since 1971 to improve the public's health through better nutrition and safer food. The organization does not accept government or corporate donations and is supported by donations from individuals and foundations and subscribers to its *Nutrition Action Healthletter*.

[2] American Antitrust Institute (AAI), Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and Services: Comment of the American Antitrust Institute 3 (Jan. 29, 2013), https://bit.ly/38126br.

[3] CSPI, Scroll and Shop: Food Marketing Migrates Online 10, 14-16 (Jan. 2020), https://bit.ly/3qrQ5nO.

---

[4] Deborah Cohen *et al.*, *Beverage Marketing in Retail Outlets and The Balance Calories Initiative*, 115 Prev. Med. 1 (2018).

[5] AAI, Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and Services at 3, 17.

[6] Laura Reiley, *Bigger Hauls, Fewer Choices: How the Pandemic Has Changed Our Grocery Shopping Habits Forever: A Permanent Shift Toward Online Shopping Means Less Innovation, Fewer New Brands and, for Some People who Lack Choices, Reinforcement of Unhealthy Eating Patterns*, Wash. Post (Sept. 1, 2020), https://wapo.st/3tjpWto.

[7] *Id.*

[8] *USDA Expands Access to Online Shopping in SNAP, Invests in Future WIC Opportunities*, USDA FNS, (Nov. 2, 2020), https://www.fns.usda.gov/news-item/fns-001820; *Supplemental Nutrition Assistance Program Participation and Costs*, USDA FNS (Dec. 11, 2020), https://bit.ly/3oFOidj.

[9] CSPI, Rigged: Supermarket Shelves for Sales 4, 17-18, 22-32 (Sept. 2016), https://bit.ly/2NRGI2l. Slotting fees are payments to introduce a new product. Staying fees are payments manufacturers must pay to remain on store shelves. Display fees are payments for premium spots, like an end-of-aisle display. Free-fill refers to the practice of providing free product to the retailer as a form of payment for various in-store promotional activities. *Id.*

[10] *Id.*

[11] Donald Rose, *Access to Healthy Food: A Key Focus for Research on Domestic Food Insecurity*, 140 J. Nutr. 1167, 1168 (2010).

[12] Deborah Cohen *et al.*, *Candy at the Register—A Risk Factor of Obesity and Chronic Disease*, 367 New England J. Med. 766 (2012)

[13] Marcia Mogelonsky, *Keep Candy in the Aisles*, 20 American Demographics 32 (1998).
[14] Apparent Cooperative Marketing Agreement (2012), Ex. 1.

[15] AAI, Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and Services 3 (Jan. 29, 2013).

[16] Nicholas Freudenberg, Lethal but Legal: Corporations, Consumption, and Protecting Public Health (2014).

[17] AAI, Competitive Exclusion in Category Captain Arrangements 23-26 (Aug. 30, 2018), https://bit.ly/3i1TXs8.

[18] *Id.* at 27.

[19] *Id.* at 30.

[20] *Id.* at 25-26, 30.

[21] Thomas B. Leary, A Second Look at Category Management (May 17, 2004), https://bit.ly/3tk5fNK.

[22] CSPI, Scroll and Shop at10, 14-16.

[23] Emma Beckett, *How Big Food Drives Impulse Buys Online*, Food Dive (July 30, 2018), https://bit.ly/3asTBb3; Danielle Wiener-Bronner, *Hershey's Plan to Keep Impulse Candy Shopping Alive*, CNN Business (Oct. 3, 2018), https://cnn.it/2MF51jz.

[24] CSPI, Scroll and Shop at 38-39.

[25] FTC, 2013 Letter to Search Engines (June 24, 2013), https://bit.ly/39DA1td.

[26] Berkeley Media Studies Group, The New Age of Food Marketing: How Companies are Targeting and Luring our Kids and What Advocates Can do About It 10 (Oct. 2011), https://bit.ly/39D7qEs.

[27] Emma Beckett, *How Big Food Drives Impulse Buys Online*, Food Dive (July 30, 2018), https://bit.ly/3asTBb3.

[28] Jennifer Valentino-DeVries, *How E-Commerce Sites Manipulate You into Buying Things You May Not Want*, NY Times (June 24, 2019), https://nyti.ms/2A8l4k8.

[29] Rosanna Morrison & Lisa Mancino, *Most U.S. Households Do Their Main Grocery Shopping at Supermarkets and Supercenters Regardless of Income*, USDA Economic Research Service (Aug. 3, 2015), https://bit.ly/2YCqFrj.

[30] Lisa Mancino & Joanne Guthrie, *Supermarkets, Schools, and Social Gatherings: Where Supplemental Nutrition Assistance Program and Other U.S. Households Acquire Their Foods Correlates with Nutritional Quality*, USDA Economic Research Service (Feb. 21, 2018), https://bit.ly/36v9vR2.

[31] Jennifer Poti *et al*., *Where are Kids Getting their Empty Calories? Stores, Schools, and Fast Food Restaurants Each Play an Important Role in Empty Calorie Intake Among US Children in 2009-2010*, 114 J. Acad. Nutr. Diet. 908 (2014).

[32] Ruopeng An & Gerard Maurer, *Consumption of Sugar-Sweetened Beverages and Discretionary Foods Among US Adults by Purchase Location*, 70 Eur. J. Clin. Nutr. 1396 (2016).

[33] Leslie Fischer *et al.*, *Development and Implementation of the Guiding Stars Nutrition Guidance Program*, 26 Am. J. Health Promot. e55 (2011).

[34] Jacqueline Kerr *et al.*, *Assessing Reliability and Validity of the Gropromo Audit Tool for Evaluation of Grocery Store Marketing and Promotional Environments*, 44 J. Nutr. Ed. Behavior 597 (2012).

[35] Deborah Cohen *et al.*, *Beverage Marketing in Retail Outlets and The Balance Calories Initiative*, 115 Prev. Med. 1 (2018).

[36] CSPI, Scroll and Shop at 5-6. CSPI assessed the nutritional quality using an adapted version of the National Alliance for Nutrition and Activity (NANA) Vending Standards, which are based on the Dietary Guidelines for Americans. *See* NANA, Model Beverage and Food Vending Machine Standards (2013), https://bit.ly/37gPMVg. For example, a food product was determined to be healthy if no more than 35 percent of its calories were from total sugars; no more than 35 percent of its calories were from fat; no more than 10 percent of its calories were from saturated fat; no more than 200 milligrams of sodium were in a serving; and it contained a positive nutritional component, such as a quarter cup of fruit. *See* CSPI, Scroll and Shop at 20.

[37] *Id.*

[38] Concerning online retail and data collection, the FTC has: (1) issued a letter on search engine results, in which the agency stated that there is a "potential for consumers to be deceived, in violation of Section 5 of the FTC Act, unless search engines clearly and prominently distinguished advertising from natural search results," and (2) investigated data brokers, discussing the need for greater transparency in the data collection industry. FTC, 2013 Letter to Search Engines (June 24, 2013), https://bit.ly/39DA1td; FTC, Data Brokers: A Call for Transparency and Accountability (May 2014), https://bit.ly/3cxj5qo.

[39] FTC Staff, Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry (2001), https://bit.ly/31g3Kol.

[40] *Id.*

[41] FTC Staff, Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories (2003), https://bit.ly/3ezBf90.

[42] *Id* at ii-vi.

[43] *Id.*

[44] 15 U.S.C. § 46(b).