Dear Chair Khan,

We write to urge the Federal Trade Commission (FTC) to revive enforcement of the Robinson-Patman Act (RPA). Nearly every step of the food supply chain is highly concentrated, causing higher prices to consumers and harming farmers and small businesses.\(^1\) This consolidation happened after RPA enforcement fell into disuse in the 1970s. But the RPA is still the law of the land and can be a critical tool to promote fair competition in the food industry. The FTC should investigate potential RPA violations and, when merited, bring lawsuits under the RPA to protect small businesses, farmers, workers, and consumers.

Congress passed the Robinson-Patman Act to create a level playing field for retailers by ensuring that both small and large firms pay the same price for comparable products.\(^2\) The RPA prohibits sellers from engaging in price discrimination and prevents sellers and buyers from skirting around the price discrimination ban by giving more favorable commissions, brokerages, processing fees, handling fees, or other similar schemes to certain buyers. Strong enforcement of the RPA in the years after its passage succeeded in promoting competition between small and independent retailers and larger chain stores.\(^3\) Unfortunately, misguided theories of antitrust popularized in the 1970s and 1980s led to the RPA’s disuse, and the law has essentially laid dormant for the last 40 years.\(^4\) Despite this shift by enforcers and courts, the RPA is still law and all the precedents that enabled the prior era of successful RPA enforcement still stand.

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4. Id. at p. 40.
Given the RPA’s successful record, and the high levels of concentration in the food and retail industries, the FTC must use this valuable authority to investigate and police potential violations. Today, the food industry is more consolidated than when Congress adopted the RPA. Currently, four food retailers account for over a third of national grocery sales. Grocery suppliers are also highly concentrated—four firms controlled more than 60 percent of sales in most grocery categories in 2019, and some categories are almost entirely controlled by a single food company.

Because of this concentration, dominant retailers can extract more favorable prices and terms from suppliers, beyond what might be justified by economies of scale. Suppliers are often forced to make up their losses by charging higher prices to independent, smaller grocery stores. This phenomenon, called the “waterbed effect,” requires independent stores to internalize the higher costs or pass them onto consumers. Price discrimination can therefore hurt small and medium businesses and hike up food prices for consumers. The harm to consumers may be greatest in communities most likely to be served by independent groceries and pharmacies, such rural communities or areas with higher levels of poverty.

Consolidation and preferential pricing for large chains also inflict harms beyond those seen on a store receipt. Independent grocery stores benefit their community as employers and by attracting foot traffic to other local businesses. In contrast, large grocery chains often direct these benefits outside of the communities where they are located. Large chains can obtain enough control of a local market to reduce wages, benefits, or their workforce.

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without the risk of meaningfully decreasing their bottom line. Additionally, large grocery and retail chains regularly outsource production to overseas firms that produce lower-quality goods with less workplace regulations and lower wages than those in the United States.

Concentration in retail also incentivizes competing firms to consolidate. Food retail has experienced an uptick in mergers and acquisitions to match the trend toward consolidation in other parts of the food supply chain. Kroger Company’s proposed $24.6 billion acquisition of Albertsons Companies, Inc. would result in a duopoly with Walmart. The two corporations would control more than 70 percent of the grocery market in over 160 cities, increasing their ability to lower wages and unfairly exert pricing power. Further consolidation of food retailers, such as the Kroger-Albertson’s merger, fuel the vicious cycle of concentration and price discrimination.

The FTC should use the RPA to combat price discrimination and concentration. Congress enacted the RPA to address these exact problems in the food and retail industry. The RPA is an effective tool to promote fairness and competition and to protect small businesses. The FTC should also use the RPA to combat creative, subtler forms of price discrimination that have emerged in recent years, namely slotting fees and volume-based rebates. These practices harm small retailers and producers and may exclude new entrants from the food retail market.

The FTC should explore whether discriminatory slotting fees violate the RPA. In recent decades, producers and suppliers began paying food retailers slotting fees to secure shelf space for their products. Retailers may also charge “display,” “promotional,” “end cap,” or “pay to stay” fees for product placement. The fees are ostensibly used to help cover the cost of restocking shelves. But the largest food brands can offer retailers large slotting fees that smaller producers cannot match, unfairly excluding emerging companies from obtaining or increasing their shelf space.

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17 Id.
A supplier may violate the RPA if it pays a large slotting fee to a big chain, but offers to pay less to competing, smaller retailers. A large buyer may violate Section 2(f) of the RPA or Section 5 of the Federal Trade Commission Act if it encourages such discrimination. Slotting fees may also be considered an illegal brokerage under section 2(c) of the RPA. And, when food producers and wholesalers pay slotting fees to dominant retailers in exchange for better shelf space or other preferential treatment, these payments may violate sections 2(d) and 2(e) if the supplier is not offering these same payments to competitors.

The FTC should also consider whether certain rebate practices violate the RPA. Food manufacturers and suppliers sometimes offer distributors or retailers large rebates in return for ordering a set sales volume or a set percentage of all the buyer’s purchases within a food category. These rebates can have the implicit or explicit effect of excluding competition. Grocery stores and other food retailers have grown to depend on these rebate revenues. But smaller, independent stores often cannot obtain large enough rebates to compete with the revenue boost obtained by existing dominant suppliers. Rebates also figure heavily into the business models of food service management companies, which leads to smaller suppliers being excluded from large swaths of food offerings at large organizations, such as business headquarters, colleges, or hospitals. These rebates may be impermissible under Section 2(c) of the RPA.

Unfair competitive practices and high concentration in the food industry harms small businesses, workers, and consumers. Dominant food retailers and wholesalers can use their purchasing power to drive out independent grocers, small businesses, and other competitors. By limiting competition, the largest firms can raise the price of food and lower worker’s wages. Congress enacted the Robinson-Patman Act to give the FTC the

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19 Id.

20 Id.


22 Id.

23 Id.

24 Id.

25 Id.

26 Id.

authority to prevent these related risks of price discrimination and local businesses being driven from the marketplace. By enforcing the RPA, the FTC can prevent dominant market players from further eroding the economic and social benefits that independent stores provide to their communities. We urge the FTC to fulfill Congress’s intent and enforce the Robinson-Patman Act.

Sincerely,

Elizabeth Warren  
United States Senator

Mary Gay Scanlon  
Member of Congress

Becca Balint  
Member of Congress

Christopher S. Murphy  
United States Senator

Katie Porter  
Member of Congress

Richard Blumenthal  
United States Senator

Alexandria Ocasio-Cortez  
Member of Congress
Chris Deluzio
Member of Congress

Summer Lee
Member of Congress

Cory A. Booker
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Bernard Sanders
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Zoe Lofgren
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Seth Magaziner
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Marie Gluesenkamp Perez
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Pramila Jayapal
Member of Congress