NRF National Retail Federation

February 1, 2022

The Honorable Frank Pallone
Chairman, Committee on Energy
and Commerce
U.S. House of Representatives

The Honorable Cathy McMorris Rodgers
Ranking Member, Committee on Energy
and Commerce
U.S. House of Representatives

The Honorable Jan Schakowsky
Chair, Subcommittee on Consumer
Protection & Commerce
U.S. House of Representatives

The Honorable Gus Bilirakis
Ranking Mem., Subcommittee on Consumer
Protection & Commerce
U.S. House of Representatives

Dear Chairman Pallone, Ranking Member McMorris Rodgers, Chair Schakowsky, and Ranking Member Bilirakis:

The National Retail Federation appreciates your holding a subcommittee hearing tomorrow on the important issue of price gouging. To protect American consumers, NRF supports efforts to rid the marketplace of bad actors who deceive consumers through unfair or deceptive acts or practices, including illegal price-gouging activity that violates existing price-gouging laws in nearly 40 states. We are concerned, however, with the prospect of new federal legislation to address problems that have complex origins as the result of the pandemic and may not be the product of illicit price-gouging behavior. Moreover, we are concerned that the authority to be granted to the Federal Trade Commission (FTC) may not be narrowly tailored to target price-gouging activity on essential goods and services at risk of such fraud during the COVID-19 health emergency; and, that equipped with broad discretionary authority, the FTC could have a broader impact on pricing of all goods in the economy with unintended and counter-productive results that causes greater price increases for consumers.

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

## Supply Chain and Inflationary Pressures on Cost of Goods

The current supply chain crisis has been affecting companies both large and small who are being impacted by disruptions at every stage of the supply chain. In general, the demand for goods and materials continues to far outpace the availability of supply to make and move those products through the global supply chain, resulting in significant congestion and increased costs and fees, which are leading to increased inflation.

We continue to see disruptions originating overseas, with growing uncertainty about the COVID-19 omicron variant that threatens to again shut down foreign factories and foreign ports. There continue to be shortages in available materials and workforce to produce goods both here and abroad, a shortage of empty containers to transport the goods, a lack of available capacity aboard maritime vessels, continuing port congestion affecting U.S. ports and challenges with chassis availability and empty container returns.

These disruptions have all added more time and costs to NRF members' supply chains. Retailers have been working to mitigate these challenges throughout the pandemic, especially in advance of the all-important holiday season. They have taken many steps to try to mitigate the disruptions, which included bringing in products earlier, looking for alternate sourcing, using alternate ports and using air freight instead of ocean freight. Again, all of these options have added time and costs to their supply chains.

Even having taken these steps, retailers continued to face ongoing disruption and challenges with getting their cargo in a timely manner. In a September 2021 survey of NRF members, all respondents noted that their supply chain costs had increased at every step along the way. They identified their top three challenges as port congestion, container availability and carrier capacity. Many expected those issues to continue well into 2022.

In general, the unprecedented consumer demand over the past couple of years has certainly had a major part to play in supply chain disruption as retailers try to keep up. There has been a $1 trillion shift in consumer spending from services (travel, entertainment, etc.) to goods, which has put upward pressure on goods' prices. Many expect inflation to peak in the next couple of months, though this is dependent on a number of factors including easing of pressure on the supply chain and softening consumer demand.

Retailers continue to take extraordinary steps to ensure products are available to consumers. These include bringing in cargo earlier than normal, using alternate ports beyond the Ports of Los Angeles and Long Beach, chartering vessels, shifting to air freight over maritime and looking at alternate sourcing.

In addition, retailers worked closely with their transportation providers, especially their carriers and truckers to clear cargo as quickly as they could. Many retailers also worked closely with the port authorities to identify critical cargoes that needed to move and worked directly with White House Port Envoy John Porcari and the Supply Chain Task Force to identify additional opportunities.

Even with these steps, many constraints remain in the ability to quickly move cargo from the ports, especially as more vessels continue to wait to berth and unload. Some of the key constraints continue to be specific to port operations and empty return policies and the availability of chassis. Retailers want to pick up their cargo, but have difficulty when truckers are not able to make appointments, return empty containers or have a chassis available. \

In an updated benchmarking survey, many NRF members believe that the supply chain disruptions will continue well into 2022. The majority of respondents believe that the challenges will continue between 10-12 months. Respondents continue to say that U.S. port congestion, ocean carrier capacity and workforce shortages are the top areas where they are seeing supply chain disruptions.

A softening of consumer demand will certainly help to alleviate the pressures on the supply chain. NRF's Global Port Tracker is forecasting imports to continue to increase through 2022, but at a single digit rate as opposed to the double-digit rate we witnessed in 2021.

There are specific ways that Congress and the Administration can help alleviate some of the supply chain disruptions, but we caution that some aggressive policy interventions to address the broader inflation could aggravate, rather than alleviate, inflationary trends.

The Administration needs to take a leadership role in addressing the ongoing congestion issues. Many are systemic issues that need to be addressed to avoid future supply chain disruptions. We would recommend the following actions for the administration:

- Convene all affected stakeholders to discuss the current supply chain issues and identify short, medium and long-term solutions;
- Pass the Ocean Shipping Reform Act of 2021;
- Codify the Federal Maritime Commission's Interpretive Rule on Demurrage and Detention;
- Develop a national freight portal;
- Ensure we have a sufficiently trained workforce;
- Evaluate whether or not our ports are operating in a manner that truly meet the needs of a 21st century global supply chain; and
- Provide tariff relief.

**Federal Price Gouging Legislation**

We appreciate Chair Schakowsky's work on H.R. 675 and we look forward to working with you and all members of the committee to develop bipartisan federal price gouging legislation that is narrowly tailored to address the unfair or deceptive acts or practices that nearly 80% of the states have targeted with their own enacted state laws. Key elements of state price gouging laws include government authority that is provided during an emergency that is principally focused on excessive prices for essential goods and services that are not accounted for by other cost factors in the marketplace. As demonstrated by the discussion of supply chain and inflationary pressures above, the retail industry has seen a very marked increase in well-documented economic and trade factors that have raised the prices of all goods impacted by those factors.

The price increases generally across the retail industry are therefore not the result of specific companies' intentional acts of fraud or deception, from which state price gouging laws are designed to protect consumers. It is therefore imperative that any federal price gouging legislation be modeled on the language in state laws that provides exceptions to the governmental authority in cases where price increases are due to market costs outside the control of the individual business. Unfortunately, in many of the federal price gouging bills we have seen since 2020, including H.R. 675, there is insufficient language in the bill to protect against the potential unintended consequences that retailers whose prices rose due to cost increases in the supply chain and/or inflation may face potential allegations from the FTC or state attorneys general that they engaged in price gouging.

For example, H.R. 675 includes look-back periods to compare prices of goods alleged to be the product of price gouging to the average cost of the same good sold during the 2019 Thanksgiving-to-Christmas holiday season. We think comparing prices over more than two years is likely to lead to determinations in many cases that today's prices are higher, but that does not mean the FTC should conclude, by matter of interpreting a statute's definition, that the sellers of these goods are engaged in unlawful price-gouging behavior when the price increases can be explained by factors causing the cost of those goods to rise over the two-year period.

We are also concerned with extending the enforcement authority of state attorneys general to a proposed federal law that would not preempt any of the existing price gouging laws in over 40 state and federal territorial jurisdictions, including the District of Columbia.[1] In addition to enforcing their own laws in these jurisdictions, having 50 more interpretations of the statutory text (in addition to the FTC's interpretation) will only exponentially increase the likelihood of inconsistent application and enforcement of a federal law that may serve as merely one of a great number of disparate laws regulating the price of goods across the country. If the federal law does not preempt state laws, the relatively few states who lack a price gouging law would be free to pass their own new price gouging law as a companion to any non-preemptive federal law if the people of that state support such efforts.

With tomorrow's hearing representing the committee's first review of this issue this session, we look forward to being a resource to you and other members as you consider the range of economic factors impacting the price of goods so that any proposed price gouging legislation designed to protect consumers from bad actors can be properly tailored to avoid inadvertently covering well-intentioned businesses setting prices in good faith to serve their customers.

Sincerely,

David French
Senior Vice President
Government Relations

cc: Members of the Committee on
Energy & Commerce

[1] National Conference of State Legislatures, *Price Gouging State Statutes,* May 17, 2021, accessible at: https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx