NRF National Retail Federation

May 17, 2022

The Honorable Jerrold Nadler
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable Jim Jordan
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable David Cicilline
Chair, Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives

The Honorable Ken Buck
Ranking Mem., Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives

Re: Today's Subcommittee Hearing on Reviving Competition, Part 6: Rebuilding Americas Economic Leadership and Combatting Corporate Profiteering

Dear Chairman Nadler, Ranking Member Jordan, Chair Cicilline, and Ranking Member Buck:

The National Retail Federation appreciates your holding a subcommittee hearing today 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 COVID-19 pandemic and may not be the product of illicit price-gouging behavior. Moreover, we are concerned that the proposed 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. We believe that, equipped with such discretionary authority, the FTC could have a broader impact on pricing of all goods in the economy with unintended and counter-productive results leading to 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. 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 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. While we have seen some improvements in the supply chain since late 2021, there are ongoing challenges including the COVID lockdowns in Shanghai and the war in Ukraine which are adding additional pressure to the supply chain. In a February 2022 benchmarking survey, many NRF members said that the supply chain disruptions would continue well into 2022. 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. They also noted that their supply chain costs continue to rise.

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 during the latter half of 2022, 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. 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.

A softening of consumer demand will certainly help to alleviate the pressures on the supply chain. The May 2022 NRF Global Port Tracker continues to forecast 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

Retail is a highly competitive industry with transparent pricing and highly fungible and substitutable products. If shoppers see a price they don't like, they will shop in other places or for other products.

Additionally, we are in an environment where it is not just consumer prices that are rising. It is important for lawmakers to recognize that costs are also rising for retailers just as they are for the average household. Retailers are paying higher energy bills and rents, not to mention the increasing cost of goods, transportation and wages:

- The Producer Price Index (PPI) was up 11% on an annual basis in April;
- General freight trucking prices have increased by 40% and deep sea freight by 25% year-over-year; and
- Wages for retail frontline workers are increasing faster than the average U.S. wage.

Inflation is causing retailers' profitability to take a hit. Seven out of the ten largest retailers have seen net profit margins either stay flat or decrease in the most recent quarter when compared to their average net margin over the past four quarters.

Considering these factors, when it comes to the price-gouging as an economic theory on the cause of higher prices, we urge lawmakers to consider what the top economists are saying. In a poll of over 40 of the top economists in the country, Chicago Booth's Initiative on Global Markets program asked if '***a significant factor behind today's higher US inflation is dominant corporations in uncompetitive markets taking advantage of their market power to raise prices in order to increase their profit margins'***. The program found that 67% of the economists disagreed with this statement with only 7% agreeing.

We appreciate that members of the House have engaged in genuine efforts 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 the pandemic began, 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.

Price-gouging bills have also included 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 a specified period – in some bills, like H.R. 675, that reference period is the 2019 Thanksgiving-to-Christmas holiday season. We think comparing prices over more than two years is very likely to lead to determinations in most cases that today's prices are indeed 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 simply 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 the FTC and 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 state attorneys general enforcing their own laws in these jurisdictions, having 50 more interpretations of the federal law (in addition to the FTC's own 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 that goes beyond it and potentially conflicts with the newly passed federal law.

With today's hearing representing the committee's first significant review of this issue, we look forward to being a resource to you and other members as you consider the range of

[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

economic factors impacting the price of goods. We urge you to consider that any proposed price gouging legislation designed to protect consumers from bad actors can and should be properly tailored to avoid inadvertently covering well-intentioned businesses setting prices in good faith under challenging economic conditions to serve their customers as best they can.

Sincerely,

David French
Senior Vice President
Government Relations

cc: Members of the Committee
on the Judiciary