October 19, 2011

Submitted Electronically

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex N)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: 16 CFR Part 424—Retail Food Store Advertising Rule, Project No. P104203

On August 18, 2011, the Federal Trade Commission (FTC) published in the Federal Register an advance notice of proposed rulemaking (ANPRM) [1] requesting comment on the overall costs, benefits, necessity, and regulatory and economic impact of the FTC's rule for "Retail Food Store Advertising and Marketing Practices" (the "Unavailability Rule").

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the request of the FTC for comment on the ANPRM.

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

The Unavailability Rule applies only to retail food stores. It states that it is an unfair or deceptive act or practice for retail food stores to advertise "food, grocery products or other merchandise" at a stated price if those stores do not have the advertised products in stock and readily available to consumers during the effective period of the advertisement.

[1] 76 Fed. Reg. 51308 (August 18, 2011).

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Background

FMI has a long history of working with the FTC on the Unavailability Rule. The original Rule, promulgated in 1971, essentially required 100 percent availability for any advertised item. The item had to be available for the last customer on the last day of the sale. Even if a raincheck or substitute item were offered, the grocer remained in violation and subject to a $10,000 fine. As a result, many FMI members were required to order extra inventory and conduct greater inventory monitoring beyond standard good industry practices to remain in compliance. The rule paradoxically had a negative impact on consumers in so much as it discouraged grocers with limited quantities of "good buys" or who were unable to predict demand for particular items from advertising their availability to consumers.

The FTC in 1979 commissioned an independent study of the rule. FMI helped in the development of the questionnaire. The following year the FTC released its Market Facts Study which concluded that consumers do not see any problem with the availability of advertised items in retail food stores and were unwilling to pay more for extra availability. FMI commented on this study.

In 1985 the FTC issued a notice of proposed rulemaking to amend the rule. FMI submitted comments on the proposed rule. The next year the FTC held two days of public hearings on the proposed rule. FMI provided the only witnesses at the hearing. There were no witnesses opposed to changing the Unavailability Rule. The FTC staff in 1987 reviewed the hearing record and recommended that the rule be amended. FMI commented again. On April 20, 1988, the FTC voted to amend the rule. The new Unavailability Rule was published on August 29, 1989, and allowed for food stores to offer rainchecks or substitute items when a store unintentionally runs out of an advertised item.

Responses to FTC Questions

Headings that are italicized reference specific requests for information posed by FTC in the ANPRM.

1. Is there a continuing need for the Rule? Why or why not?

FMI does not believe there is a continuing need for the rule. Grocery retailers are committed to serving their customers and compete for return business. With profits at less than a penny on the dollar, and a higher trip frequency than essentially any other form of retail, repeat business is the key to success in the supermarket industry. Competition among retailers is cutthroat and grocers know that if they fail to meet the needs of their customers they will be unable to succeed in the marketplace. Retailers are responding to the needs of their customers. Shopper satisfaction with their primary store has been high for many years and has risen steadily over the past 5 years,

improving even in the challenging economy.[2] There is no incentive for grocery retailers to engage in the types of activity the Unavailability Rule was intended to address. Stockouts actually hurt retailers.

Stockouts Impose Substantial Costs on Food Retailers: No Economic Incentive Exists for the Advertisement of Out-of-Stock Items

Stockouts impose significant costs on retailers. There simply is not an economic incentive for them to deliberately advertise out-of-stock (OOS) items.

OOS items produce direct sales loss which has been estimated to be up to 4 percent of sales annually.[3] However the total cost of OOS is much higher than lost sales:

From a services delivery perspective, an OOS item indicates that a number of service failures have occurred, and these service failures point to lowered consumer satisfaction, decreased store and brand loyalty and increased shopper costs.[4]

Forecasting is essential to marketing and ordering accuracy in the supermarket industry. The presence of OOS items distorts true shopper demand, thus decreasing forecasting and ordering accuracy. Furthermore, operational costs are increased through personnel looking for OOS items in the back room, providing rain checks to shoppers and performing unplanned stocking.[5]

OOS results in a direct loss of store loyalty and decreased customer satisfaction. OOS also encourages shopping at a competitor store which may result in permanent shopper loss to competitors.[6]

> What happens when a shopper doesn't find the product they are looking for on the shelf? The immediate response is likely disappointment, annoyance, frustration or even anger—with the situation, the store and even the manufacturer. The next response is a decision and buying action: wait to buy on the next trip, go somewhere else to purchase now, buy another product (either another item of the same line or a different brand) or do not buy at all. Again, the response will depend on the type of product and the urgency of the need, but the overall reaction is bad news for the manufacturer 31 percent of the time and bad news for the retailer 43 percent of the time. Since substitutions typically involve purchase of a lower priced item, consumers spend less, retailers sell less, and manufacturers lose brand equity. The consumer's store and brand loyalty is tested as they are unexpectedly

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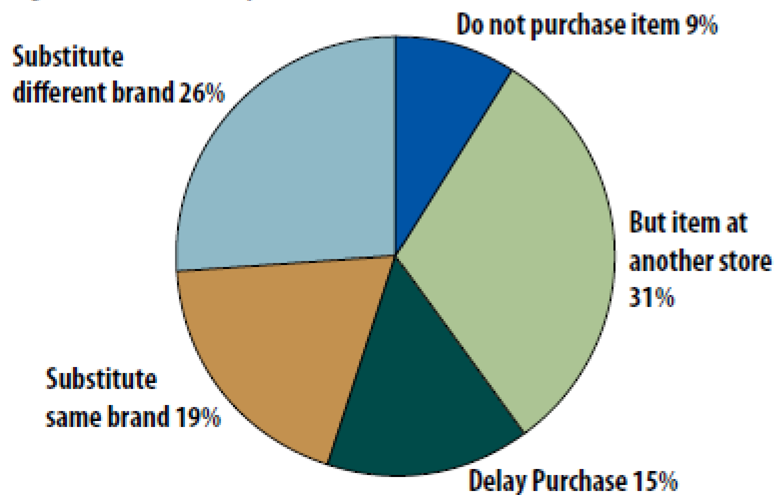
[2] Food Marketing Institute, 2011 U.S. Grocery Shopper Trends.
[3] A Comprehensive Guide To Retail Out-of-Stock Reduction In the Fast-Moving Consumer Goods Industry, Gruen and Corsten (2007).
[4] Id.
[5] Id.
[6] Id.

> put in a position of trying another brand or another store—perhaps leading to a permanent switch. In addition, when a sale is lost the manufacturer may risk penalties from the retailer for failure to meet expected service levels. The stakes are clearly high and the $7-to-$12 billion of revenue at risk annually due to stock-outs may be only a fraction of the full potential impact of the problem.[7]



In a large volume store, the weekly cost of OOS is about $800 per week.[8]

OOS Levels are Not Increasing

OOS levels are not increasing:

> It has been more than a decade since the landmark report, "Where to Look for Incremental Sales Gains: The Retail Problem of Out-of-Stock Merchandise" was published by the Coca-Cola Retailing Research Council. . . Since then a series of studies in the U.S. and around the world have looked at the scope, costs and causes of stock-outs and consumers' reactions to them . . . the ranges are remarkably consistent in the extent, impact, and causes of OOS. More recent studies

[7] Nielsen, Attacking Stock Outs (2008).
[8] A Comprehensive Guide To Retail Out-of-Stock Reduction In the Fast-Moving Consumer Goods Industry, Gruen and Corsten (2007).

> continue to report results comparable to those of an in-depth analysis for the Grocery Manufacturers Association.[9]

There is simply no evidence that would point to any need to change the Unavailability Rule as it applies to retail food stores.

2. What benefits has the Rule provided to consumers, or what significant costs has the Rule imposed on consumers?

FMI does not believe that the Rule has provided any significant benefits to consumers. The grocery industry is a volume-driven business and retailers can only succeed with repeat customers. Competition in the industry is robust and retailer battle to meet the demands of the consumers. Even if the Rule were eliminated, the marketplace would regulate itself. Food retailers that engage in such tactics will not be viable in the marketplace.

Because the FTC changed the Rule in 1989 to allow retailers to provide rainchecks or substitute products for advertised items that were out of stock, FMI does not believe the Rule imposes significant costs on retailers. Consumers ultimately bear many of the regulatory costs retailers face in the form of higher prices at the register. Because we believe the amended Rule does not impose significant costs on retailers, it follows that it does not impose significant costs on consumers.

3. What modifications, if any, should the Commission make to the Rule to increase its benefits or reduce its costs to consumers?

The 1989 modifications substantially reduced the burden the Rule on industry as well as reduced costs to consumers and they should remain in place. The former rule essentially called for 100 percent availability of any advertised item without regard to intent or human error. For example, the scrupulous grocer who runs out of an advertised product because an approaching snow storm drives customers into the store in unexpected numbers was treated the same manner under the rule as a retailer who intentionally advertises out of stock items.

The original rule actually discouraged the use of rainchecks. Even if a customer was offered a raincheck in good faith when supplies of an item were unexpectedly depleted, the retailer remained in violation of the rule and was subject to a $10,000 fine. Indeed the raincheck actually became evidence of the violation!

Consumer organizations, such as Consumers Union, agreed with FMI that the modifcations would reduce costs and increase benefits to consumers.

[9] Nielsen, Attacking Stock Outs (2008).

The 1989 modifications to the Rule took care of this issue and should remain in place if the Rule is continued.

7. Provide any evidence concerning the degree of industry compliance with the Rule. Does this evidence indicate that the Rule should be modified? If so, why, and how? If not, why and how not?

There is no evidence that would justify a modification to the Rule as it applies to the supermarket industry. Shopper satisfaction with their primary store has been high for many years and has risen steadily over the past 5 years.[10] As no other factor impacts trip satisfaction as much as OOS items,[11] high and rising store satisfaction levels demonstrate that problems regarding OOS items generally are being perceived by consumers as marginal and diminishing. Furthermore evidence exists that OOS levels have remained stable over the years or have declined.

We urge the Commission to revisit its staff report issued on August 29, 1985, which makes several key points regarding the original rule. First, it explains that the rule was not a response to widespread consumer complaints regarding unavailability in grocery stores, and that the rulemaking never elicited evidence that unavailability was perceived to be a problem in the industry. Second, it notes that the evidence indicated that unavailability rates varied widely within and among firms; no evidence was set forth as to why or which observed rates were too high, why all stores should have the same rates, or as to what had produced a market failure that might cause unavailability or mispricing rates to be higher than they should be. Third, it observes there was no attempt to measure the benefits of reducing the rates or the costs of doing so. In addition, following the issuance of the Rule, a significant amount of evidence suggested that consumers were made worse off by the rule before it was changed.

FMI appreciates the opportunity to comment on this important matter.

Sincerely,

Erik R. Lieberman
Regulatory Counsel

[10] Food Marketing Institute, 2011 U.S. Grocery Shopper Trends.
[11] Food Marketing Institute, 2011 The Food Retailing Industry Speaks.