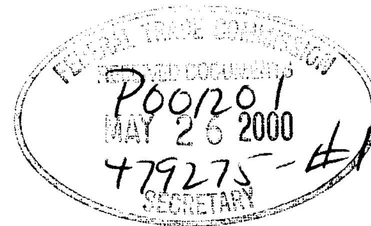
SPECIALTY FOOD Distributors and Manufacturers Association
formerly the *NATIONAL FOOD DISTRIBUTORS ASSOCIATION*

401 North Michigan Avenue • Suite 2200
Chicago, Illinois 60611-4267
Phone: (312) 644-6610 • Fax: (312) 527-6783
E-mail: sfdma@sba.com • www.specialtyfoods.org



Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments Regarding Slotting Allowances and Other Grocery Marketing Practices: 65 FedReg 15911 (March 24, 2000)

Dear Mr. Clark:

The Specialty Food Distributors and Manufacturers Association ("SFDMA") appreciates the opportunity to provide written comments for inclusion in the public record for Federal Trade Commission Workshop to examine the appropriate antitrust assessment of slotting allowances, category management and other grocery marketing practices.

SFDMA is an umbrella organization for several unique segments of the specialty food industry, including the Biscuit and Cracker Distributors Association, the Hispanic Food Distributors Association and the Kosher Food Distributors Association. Our membership is comprised of distributors and manufacturers of specialty food products of all types, for example - - cookies, crackers, Hispanic foods, olive oil, pastas, sauces, Asian foods, teas, beans and rice. Specialty foods are generally sold by manufacturers through specialty food distributors to retail grocery outlets, which vary from the largest supermarkets chains to the smaller independent grocer. The majority of specialty food items are delivered to retail outlets on a Direct Store Delivery (DSD) basis.

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In the Federal Register notice announcing the workshop, the Commission included a number of questions that would be addressed, including:

> "What other types of grocery marketing practices - - such as category management - - may raise antitrust concerns? What are those marketing practices, and under what circumstances might they pose antitrust issues?"

Scan Based Trading Raises Antitrust Concerns

SFDMA would like to raise a "grocery marketing practice" which has severe economic impact on our members and which raises significant antitrust concerns: **scan based trading**. Sometimes referred to as pay-off-scan, scan based trading is a form of

consignment selling which has the DSD vendor delivering product to a retailer with no check-in procedures and, most critically, no payment:

- Scan based trading is a consignment sale. The retailer does not pay the DSD vendor for product until sometime after it is purchased by the shopper and scanned at the front register.
- There are generally no back-door delivery check-in procedures.
- Scan based trading shifts the time of payment to the DSD vendor from delivery date to sometime after the date the product is actually sold by the retailer.

According to one media report, about 12 retailers are now using scan based trading daily, two manufacturers have scan based trading operations in more than 1,500 stores each and more than a dozen others are in pilots or regular operations with one or more retailers. (*Supermarket News,* April 10, 2000, p.36).

Scan based trading has obvious benefits for the supermarket giants and other power buyers. The disadvantages to the DSD vendor are particularly acute for the specialty product segment of the industry. To illustrate, the large self-distributing companies (e.g., Frito-Lay, Coca Cola) market products with relatively rapid turnover. High-velocity items can turn in as little as 3 days from receipt by the supermarket to sale to its customer. On the other hand, specialty products tend to be low-velocity items which may turn in 70 days or longer.

This situation presents a serious and potentially fatal, economic impact on the specialty food distributor. An SFDMA member typically places 4,000 to 6,000 different items (SKUs) in large supermarkets and other outlets. With the value of inventory in a large store at about $100,000, and scan based trading slowing payment to 70 days, this practice has the real potential to bankrupt our members - - and eliminate these specialty food products and their vendors from competition and driving up the cost of higher-velocity items as a result of decreased competition.*

The economic hardship is even more pronounced when a supermarket changing over to scan based trading implements the program retroactively by requiring the specialty food DSD vendor to "buy back" its product already on the supermarket's shelf as of the changeover date. This has in fact occurred.

* One major supermarket chain described the supermarket's benefits derived from imposing scan based trading on the DSD vendor as follows: "The vendor owns the inventory. *This is especially beneficial [to the supermarket] for inventory that turns slow.*" (Emphasis added). Of course, this produces a concurrent economic hardship on the vendors of specialty foods.

Scan Based Trading Really is Slotting Allowance

The Commission describes a slotting allowance as a lump-sum, up-front payment that a food vendor must pay to a supermarket for access to its shelves. SFDMA suggests a broader, and more appropriate, description is any payment, discount or other consideration granted by a grocery product vendor in return for supermarket (or other retailer) display or other favorable treatment of the product. In any event, when a powerful supermarket demands that a specialty food vendor accept scan based trading as a condition of having that product displayed on the shelves, there is a payment in the form of an interest free loan on the consigned products. Clearly, scan based trading is a marketing practice that falls within the boundaries of a "slotting allowance."

SFMDA doesn't mean to suggest that a power buyer may not demand a DSD vendor to accept a scan based trading arrangement and also agree to provide some other form (or forms) of payment to the retailer in order to secure shelf space. One would expect the stronger the retailer, the more concessions will have to be made by the vendor to gain access to shelf space; and the stronger the supplier, the greater degree of exclusivity (excluding the supplier's rivals) the retailer may have to grant.

Slotting Allowances are Not Always Legal

The antitrust legality of a slotting allowance (including a scan based trading arrangement) requires a careful analysis of all the surrounding facts and circumstances. Slotting allowances are not always legal. The Commission clearly recognizes this fact in its recent Congressional testimony** which made the following points:

- Slotting allowance practices are neither always lawful under the antitrust laws, nor are they always unlawful;
- Such practices sometimes reflect efficient cost/risk sharing arrangements between vendor and supermarkets and other times reflect the misuse of the vendor's or supermarket's power;
- Exclusionary and discriminatory practices threaten the ability of smaller vendors and smaller retailers to compete;
- Practices by a dominant vendor or dominant retailer can harm competition generally; and

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** "Slotting Allowances and the Antitrust Laws," Willard K. Tom, Deputy Director, Bureau of Competition before the House Judiciary Committee, October 20, 1999.

- In these instances, consumers are ultimately injured in the form of higher prices and fewer product choices.

We do note the Commission's statement in that testimony that the agency does not receive many complaints concerning slotting allowance practices. One plausible explanation is that the victims of abusive practices are deterred from complaining to the FTC or suing out of fear of retaliation or a belief that such action would be futile.

Finally, we are aware of attempts by some major supermarkets and grocery wholesalers to demand direct selling by the specialty food supplier, bypassing the specialty food distributor, at pricing which includes the functional discount for marketing and distribution services performed by the specialty food distributor, even though those services are not performed by the retailer. A list of services performed by the distributor are attached to this letter. This is a practice that violates the Robinson Patman Act and the U.S. Supreme Court's decision in *Texaco, Inc. v. Hasbrouck,* noting that a lawful functional discount is one "that merely accords due recognition and reimbursement for actual marketing functions" that are in fact performed. (496 U.S. 543, 562 (1990)). These demands are usually accompanied by the retailer's and wholesaler's threat to take the specialty food supplier's product off the shelf if direct sales are not made. The receipt by the retailer of this unearned functional discount is yet another form of a slotting allowance.

Conclusion

It is a fair statement that members of the Specialty Food Distributors and Manufacturers Association have been burdened by demands for scan based trading arrangements and other slotting demands from powerful retailers on whom they depend for distribution of their goods. Dominant suppliers too can use their power to exclude or limit specialty food items from the grocer's shelves. Exclusionary practices or excessive demands, wholly unrelated to a retailer's costs or risk of carrying the product, can threaten the competitive viability and survival of the specialty food manufacturer and distributor. The Federal Trade Commission is the proper agency, and is in the best position, to provide clarification of the antitrust law as it applies to slotting practices and to enforce that law.

Respectfully submitted,

Arthur Klawans
Managing Director

Encl.