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VIA ELECTRONIC FILING

April J. Tabor
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave, N.W.
Suite CC-5610 (Annex C)
Washington, D.C. 20580

Re: FTC-2021-0068-0022: Solicitation for Public Comments on the Impact of Supply Chain Disruptions on Competition in Consumer Goods and Retail Sectors

Dear Secretary Tabor and Commissioners:

Thank you for the opportunity to provide public comments in connection with the Federal Trade Commission's ("FTC's") ongoing study of the impact of supply chain disruption on competition in the consumer goods and retail sectors. We appreciate the Commission's willingness to consider input from impacted stakeholders.

The Retail Industry Leaders Association ("RILA") is the trade association of the world's largest and most innovative retailers. The retail industry employs over 42 million Americans and accounts for $1.5 trillion in annual sales. RILA's membership alone is comprised of more than 200 companies that account for more than 100,000 retail stores, manufacturing facilities, and distribution centers around the world. As such, RILA and its member companies strongly support the FTC's stated goals of preventing anticompetitive or unfair business practices and enhancing consumer choice without unduly burdening legitimate business activity.

Summary of Arguments

The FTC's Solicitation for Public Comment invited comments on supply chain disruptions and the primary factors causing them. RILA's comments address four supply chain disruption causal factors. First, exceptional consumer demand and severe supply shortages have greatly disrupted supply chains. Second, clogged ports and transportation constraints have caused shipment delays and cancellations. Third, all levels of the supply chain – from raw material production, product manufacturers, truckers and retailers – are struggling with ongoing labor shortages. Fourth, ocean carriers have taken actions that have exacerbated supply chain disruptions. The FTC can play a helpful role in supporting ongoing efforts by the Federal Maritime Commission (FMC) and the Department of Justice (DOJ) to promote competition in the maritime industry through enhanced enforcement of U.S. antitrust laws as well as providing valuable insight and expertise to help inform congressional review of the current expansive antitrust exemption accorded to ocean carriers. Lastly, as the FTC found in previous studies, the common business practices of category management, use of category captains and slotting allowances have not been shown to have anticompetitive impacts. Nor is there any credible argument that these practices disrupt supply chains. Each of these topics is discussed in further detail below.

I. Extraordinary Pandemic-Driven Consumer Demand Coupled with Severe Supply Shortages Have Created Significant and Ongoing Supply Chain Disruptions

The primary and most significant causal factor creating supply chain disruptions in the retail industry is the exceptional increased demand for goods over the past two years, which has vastly outpaced the availability and supply of products. During the early days of the pandemic, work offices, schools, restaurants, museums, theaters, live music venues, amusement parks, hair salons, and gyms all closed. Worldwide, countries closed their borders, effectively cutting off travel. Overnight, hundreds of millions of households had to adjust to working, learning, cooking, playing, and exercising at home. There was an immediate need to create new spaces for remote learning and work as well as a desire to make the home environment comfortable, organized and stylish. Consumers also sought out new hobbies, interests and forms of entertainment, which could be safely experienced in the new COVID paradigm. As a result, consumer spending shifted dramatically away from travel, experiences, and services – all activities that involved potentially unsafe interactions with other people while demand for physical goods and products in certain categories (e.g., pharmacy, groceries, cleaning supplies, home goods, electronics, office, toys, pet, exercise, casual clothing, gardening and outdoor) all skyrocketed.[1]

Unsurprisingly, this sudden, pandemic-driven shift in consumer spending led to major supply chain disruptions as retailers and other businesses were forced to recalibrate and, in some instances, completely reengineer their supply chains very rapidly.[2] The challenges retailers faced when trying to keep up with increased consumer demand were magnified by pandemic-related supply shortages at nearly every level of the supply chain. Pandemic shutdowns, restrictions and safeguards caused businesses and factories worldwide to close or significantly reduce capacity, which in turn led to shortages in raw materials, component parts, final consumer goods, packaging materials, and containers to transport goods.[3] All of these factors set the stage for significant supply chain disruptions, which adversely impacted manufacturers, distributors, retailers and consumers alike.

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[1] *See* A Spring in Consumer's Steps: Americans Prepare to Get Back to Their Spending Ways, Deloitte Insights (June 28, 2021), https://www2.deloitte.com/us/en/insights/economy/us-consumer-spending-after-covid.html ("[S]pending patterns suddenly changed. Travel, transportation, and restaurant spending were suddenly out of favor. Instead, people stockpiled food and other essentials…").

[2] *See* Jennifer Smith, *Warehouse Demand Surges as Retailers Reset Supply Chains*, The Wall Street Journal (June 21, 2020), https://www.wsj.com/articles/warehouse-demand-surges-as-retailers-reset-supply-chains-11592740800 (noting the pandemic push for "businesses to retool their supply chains.").

[3] *See, e.g.,* Ana Swanson and Keith Bradsher, *Supply Chain Woes Could Worsen as China Imposes New Covid Lockdowns*, The New York Times (Jan. 16, 2022), https://www.nytimes.com/2022/01/16/business/economy/china-supply-chain-covid-lockdowns.html (warning of "potentially debilitating supply chain disruptions as China, home to about a third of global manufacturing, imposed sweeping lockdowns").

II. Clogged Ports and Transportation Constraints Exacerbated Supply Chain Disruptions

For products that were manufactured and available for shipping, transportation challenges add cost, uncertainty, and delay in moving products to warehouses and ultimately to retail locations and consumers.[4] Limited ocean capacity, significant transit delays, port congestion, and disruptions and constraints in every transportation mode – ocean, rail, air, over the road, and parcel – have all contributed to supply shortages.[5]

Port congestion has created a chokehold on the entry and export of consumer products and agricultural goods. Lines of container ships have been forced to wait offshore often for days on end for an opening at a congested port with limited space to unload inbound containers.[6] Once offloaded, ocean carriers then have limited incentives to accept the return of empty containers and to load them for return to international ports, choosing instead to quickly return to foreign port for another inbound shipment.[7] Similarly, ocean carriers have refused to accept exports, stranding billions of dollars in U.S. agricultural exports.[8] Empty containers continue to accumulate, clogging port docks for weeks, preventing newly arriving ships from docking and unloading new cargo. Trucking operations into and out of the ports have been negatively impacted as well. A recent study revealed port truckers at the Port of Los Angeles and the Port of New York and New Jersey accumulated 50 years of idling in 2021 waiting in queues to drop off or pick up containers.[9]

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[4] *See* Rachel Layne, *Why Shoppers are Finding Many Products in Such Short Supply*, CBS News (Oct. 1, 2021, 7:59 a.m.), https://www.cbsnews.com/news/supply-chain-issues-products-worker-shortage/ ("Once goods do arrive in the U.S., they can still hit big backups in Los Angeles… What's more, the cost to ship those goods skyrocketed as containers filled up faster than China – where most containers are made – could produce them. That caused additional delays.").

[5] *See* David Lynch, *Inside America's Broken Supply Chain: How Industry Failures to Collaborate and Share Information Left the System Vulnerable*, The Washington Post (Sept. 30, 2021, updated Oct. 2, 2021), https://www.washingtonpost.com/business/interactive/2021/supply-chain-issues/ ("For goods to move seamlessly from overseas factories to American addresses, the oceangoing vessels, shipping containers, cargo terminals, truckers, chassis providers and railroads all must work together, like runners in a relay race. If equipment gets stuck at any point, delays ripple along the entire chain.").

[6] *See* David Lynch, *Inside America's Broken Supply Chain: How Industry Failures to Collaborate and Share Information Left the System Vulnerable*, The Washington Post (Sept. 30, 2021, updated Oct. 2, 2021), https://www.washingtonpost.com/business/interactive/2021/supply-chain-issues/ ("Some vessels sit for two weeks or more, effectively cutting capacity on trans-Pacific shipping lanes and driving up costs.").

[7] *See* Sam Dean, *A Broken Supply Chain is a Moneymaking Opportunity. For Who? Shipping Companies*, Los Angeles Times (Nov. 26, 2021), https://www.latimes.com/business/story/2021-11-26/the-supply-chain-crisis-is-great-news-for-logistics-companies ("the pile of import containers grows, and the only players with the power to remove the empty shipping containers to free up space – the shipping companies – have little incentive to do so expediently.").

[8] *See*, https://www.cnbc.com/2021/01/26/shipping-carriers-rejected-us-agricultural-exports-sent-empty-containers-to-china.html.

[9] Alexandre Tanzi, *Fifty Years in Idle Time Seen for Trucks at Two Major U.S. Ports*, Bloomberg Business (Nov. 3, 2021, 5:33 a.m. EDT), https://www.bloomberg.com/news/articles/2021-11-03/fifty-years-in-idle-time-seen-for-trucks-at-two-major-u-s-ports.

The current container issues have highlighted and worsened systemic operational issues at U.S. ports, which are partly due to outdated infrastructure and processes [10] as well as labor challenges and limited operational hours. U.S. ports have not had funds to invest in technology, systems or equipment or make the structural and operational changes required to meet today's global supply chain needs. As West Coast port leaders have acknowledged, "more than a decade of underinvestment" has hindered resiliency.[11] This lack of operational competitiveness is reflected in the Global Container Port Performance Index,[12] released by the World Bank and HIS Markit in 2021, which lists only four U.S. ports in its top 100, with none cracking the top 50 in the rankings. RILA has long supported the need for modernization and automation in ports.[13] Highly automated, around-the-clock operations, as well as better data infrastructure and sharing, are necessary steps to alleviate ongoing supply chain disruptions and ensure U.S. ports are competitive on a global stage.

Once cargo is finally offloaded from ships, congestion and lack of visibility create challenges for drayage truckers as they struggle to move shipments inland, largely due to difficulties retrieving cargo from congested yards, and shortages of chassis for transporting goods to distribution centers and stores.[14] In some cases, rail congestion and disruption inland creates bottlenecks for intermodal freight. Chassis availability remains constrained, as many chassis remain under empty containers that ocean carriers and terminals are disinclined to accept, and the national population of chassis is limited by prohibitively high duties on imported chassis and insufficient production capacity and raw materials domestically. All of these disruptions not only cause delays and supply shortages, they also increase the costs of goods and transportation, adding to inflationary pressure.

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[10] Fact Sheet: The Biden-Harris Action Plan for America's Ports and Waterways (Nov. 9, 2019), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/09/fact-sheet-the-biden-harris-action-plan-for-americas-ports-and-waterways/ (discussing steps necessary to address an outdated infrastructure in America's ports and waterways).

[11] Brandon Richardson, *Decade of Underinvestment: San Pedro Bay Port Executives Call for Systemic Change in Supply Chain*, Long Beach Business Journal (Oct. 19, 2021), https://lbbusinessjournal.com/decade-of-underinvestment-san-pedro-bay-port-executives-call-for-systemic-change-in-supply-chain.

[12] Global Container Port Performance Index 2020 ("Maritime transport is the backbone of globalized trade and the manufacturing supply chain, with more than four-fifths of global merchandise trade (by volume) carried by sea.") The Global Container Port Performance Index provides a comparable assessment of container port performance for this critical component of global supply chains. https://cdn.ihsmarkit.com/www/prot/pdf/0521/Container-Port-Performance_Index-WB-2021.pdf.

[13] *See e.g.*, RILA Press Statements: *Supply Chain & Infrastructure Challenges Demand BIF Vote* (Sept 9, 2021), https://www.rila.org/focus-areas/supply-chain/supply-chain-infrastructure-challenges-demand-bif; and *Retailers Welcome Port Investment as "First Priority"* (Nov. 11, 2021), https://www.rila.org/focus-areas/supply-chain/leading-retailers-port-investment-first-priority.

[14] Fact Sheet: The Biden-Harris Administration Trucking Action Plan to Strengthen America's Trucking Workforce (Dec. 16, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/16/fact-sheet-the-biden-%E2%81%A0harris-administration-trucking-action-plan-to-strengthen-americas-trucking-workforce/ (noting "[t]he pandemic exacerbated longstanding workforce challenges in the trucking industry, including high turnover rates, an aging workforce, long hours away from home, and time spent waiting – often unpaid – to load and unload at congested ports, warehouses, and distribution centers"); *see also* Paul Berger, *A Simple Piece of Steel and Wheels is Holding up the Global Supply Chain*, The Wall Street Journal (Oct. 28, 2021), https://www.wsj.com/articles/a-simple-piece-of-steel-and-wheels-is-holding-up-the-global-supply-chain-11635452843 ("Transportation executives wrestling with the supply-chain gridlock that is frustrating U.S. importers say the ability to clear the bottlenecks rests largely on a simple piece of steel and wheels that has long been an afterthought in global shipping.").

III. Universal Labor Shortages Have Negatively Impacted Supply Chains

Another significant and interrelated factor contributing to supply chain disruptions is a shortage in the labor workforce throughout each tier of the supply chain, including shortages of factory workers, port labor, truck drivers, and warehouse and retail employees. Concerns for personal health, the need to take care of a family member or to support children's remote learning, have caused millions of employees to leave their jobs during the past two years. Despite the advent of COVID-19 vaccines and increased offers of compensation and incentives, employers at all levels of the supply chain are having difficulty hiring and retaining labor. Additionally, employee COVID-19-related absences have been another challenge as employers struggle to maintain their workforce levels to support efficient operations.

At the starting point of the product supply chain, labor shortages have disrupted manufacturing and agricultural production and slowed or temporarily stopped the flow of raw materials, food, component parts and finished goods. There simply have not been enough factory and farm workers to keep up with consumer demand for products. This in turn has had a ripple effect throughout the supply chain, negatively impacting retailers' ability to keep products in stock.[15]

The transportation sector has been similarly impacted by labor shortages. U.S. port officials point to COVID-19-related dockworker absences, in part, as a factor in port congestion. Dockworkers were especially impacted by the omicron variant, with positive COVID-19 infections among International Longshore and Warehouse Union (ILWU) workers on the West Coast, for example, reaching 1,878 cases in the first month of 2022 alone - more positive cases than in all of 2021.[16] Furthermore, with the impending July 1 expiration of the main labor contract between the ILWU and the Pacific Maritime Association (PMA) for West Coast ports, importers have concerns about potential labor actions during negotiations creating additional supply chain disruption. As a result, cargo owners are already moving up shipment dates or diverting to other ports, adding additional stress to an already strained supply chain.[17]

Likewise, truck drivers, particularly with Class A licenses, remain in short supply. According to a 2021 estimate from the American Trucking Associations, the United States is short 80,000

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[15] *See* David Lynch, *Inside America's Broken Supply Chain: How Industry Failures to Collaborate and Share Information Left the System Vulnerable*, The Washington Post (Sept. 30, 2021, updated Oct. 2, 2021), https://www.washingtonpost.com/business/interactive/2021/supply-chain-issues/ ("Supply interruptions first hit the United States in early 2020, as Chinese factories closed amid coronavirus shutdowns. Shortages of Clorox wipes, masks and other medical goods have evolved since then into a kaleidoscope of scarcity, with appliances, toys, industrial parts and semiconductors all proving hard to find.").

[16] Laura Curtis, *LA, Long Beach Port Dockworker Absences Decline as Omicron Eases, American Journal of Transportation*, American Journal of Transportation(Feb. 3, 2022, 11:47 AM), https://ajot.com/news/la-long-beach-port-dockworker-absences-decline-as-omicron-eases.

[17] *See,* Joint Trade Association Letter to President Biden and Vice President Harris (March 1, 2022) expressing concern about potential labor action noting "[t]he U.S. west coast ports account for over 44% of nationwide container port traffic. The west coast is home to several key gateways that are essential to the uninterrupted flow of imports and exports, including America's busiest port complex, in San Pedro Bay.", https://www.rila.org/focus-areas/supply-chain/trade-association-letter-port-negotiations.

truck drivers – an historically high shortfall in critical supply chain workers.[18] Despite employer attempts to increase wages and benefits to attract more drivers, and the Administration's attempts to expand the labor pool by creating incentives or enabling younger drivers, driver recruitment and retention remains a challenge.[19] High demand volumes coupled with tight capacity have led to record-high rates for shippers, and in some cases, delays as they struggle to get carriage for freight. Additionally, labor and capacity constraints in last mile and parcel shipping has resulted in delayed shipments, caps on accepted volumes, and higher rates and surcharges.

All the above challenges are exacerbated when distributors and retailers lack sufficient employees to receive and stock product deliveries.[20] Retailers face additional costs associated with increased hours for existing distribution center and retail employees, as well as service level slippage when existing staff even with additional hours cannot compensate for short staffing. The end result is that the well-publicized labor shortages have disrupted the entire product supply chain from manufacture through retail.

IV. The Role of the Ocean Carrier Industry in Supply Chain Disruptions

A. Ocean Carriers Enjoy Broad Statutory Antitrust Immunity

The Shipping Act of 1916 includes the oldest surviving statutory immunity from the antitrust laws.[21] Under this immunity, ocean carriers can reach agreements with competitors concerning operations, rates and capacity that could be deemed per se illegal under Section 1 of the Sherman Act. The 1916 Shipping Act expressly conferred an exemption from the antitrust laws for certain agreements that were submitted to and approved by the U.S. Shipping Board – now the Federal Maritime Commission.[22] In 1984, Congress revised the 1916 Shipping Act to expand the antitrust exemption and discontinue the requirement that carrier agreements be "approved" by the FMC.[23] The Ocean Shipping Reform Act of 1998 allowed ocean carriers to adopt "voluntary" guidelines regarding individual service contracts, enabling members to an agreement

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[18] Driver Shortage Update 2021, American Trucking Associations, Inc. (Oct. 25, 2021), https://www.trucking.org/sites/default/files/2021-10/ATA%20Driver%20Shortage%20Report%202021%20Executive%20Summary.FINAL_.pdf.

[19] Fact Sheet: The Biden-Harris Administration Trucking Action Plan to Strengthen America's Trucking Workforce (Dec. 16, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/16/fact-sheet-the-biden-%E2%81%A0harris-administration-trucking-action-plan-to-strengthen-americas-trucking-workforce/ (discussion steps to reduce barriers for drivers to get commercial driver licenses including the launch of a 90-challenge to accelerate the expansion of registered apprenticeship programs).

[20] *See, Labor Shortage Hits Supply Chain Hard*, CSMP's Supply Chain Quarterly (May 12, 2021), https://www.supplychainquarterly.com/articles/4722-labor-shortage-hits-supply-chain-hard (noting vacancies in warehouse and retail positions as customer demand for everything from household goods to apparel and recreation items continues to surge); *see also* Rachel Layne, *Why Shoppers are Finding Many Products in Short Supply*, CBS News (Oct. 1, 2021, 7:59 AM), https://www.cbsnews.com/news/supply-chain-issues-products-worker-shortage/ ("When goods arrive at a warehouse, there are fewer people than needed to sort and move goods back out again fast enough to match consumer demand.").

[21] 46 App. U.S.C. 801 (2002), *See also*, Competition Issues in Liner Shipping (June 19, 2015) at 2, https://www.justice.gov/atr/file/823411/download.

[22] *Id.*

[23] *Id.*

to "signal" their behavior to competitors.[24] Rather than promoting a competitive, efficient shipping industry, we believe the antitrust exemption allows ocean carriers to engage in conduct that results in reduced shipping capacity, reduced service and higher prices during a time of extraordinary demand.

Thus, although ocean carriers are technically subject to the regulatory jurisdiction of the FMC, carriers enjoy broad grants of antitrust immunity with respect to their collective control of containership capacity and rate decisions under a system of agreements filed with the FMC. Under the antitrust immunity granted to ocean carriers under the Shipping Act, the FMC has limited ability to prevent such agreements from going into effect; once effective, conduct under the agreements is immune from antitrust scrutiny. Indeed, antitrust immunity applies even to carrier actions that violate Shipping Act prohibitions, and injured parties can only file reparations through the FMC's administrative proceedings.[25]

B. Increased Ocean Freight Costs Have Amplified Supply Chains Disruptions

Retailers have experienced business practices by large ocean carriers that have exacerbated ongoing supply chain disruptions. There are currently three major shipping alliances that account for over 80% of containership fleet capacity. As noted by a recent White House briefing statement, these alliances control 95% of the critical East-West trade lanes and the "lack of competition leaves American businesses at [their] mercy."[26] The market power of these ocean carrier alliances has allowed carriers to cancel or change bookings without notice.[27] Also, ocean

[24] *Id.*

[25] The potential negative impact of the antitrust exemption on U.S. shipping has not gone unnoticed by government officials charged with promoting a competitive marketplace and other antitrust thought leaders. The Department of Justice's (DOJ's) Antitrust Division has twice testified before Congress in favor of repealing the antitrust exemption. *See*, *Statement of John M. Nannes, Dep. Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 3138*, the Free Market Antitrust Immunity Reform Act of 1999, at 14 (March 22, 2000), https://www.justice.gov/atr/public/testimony/4377.pdf ("Rather than continue to tinker with a regulatory structure and attempt to legislatively define which specific anticompetitive practices should be tolerated in which circumstances, we urge Congress to enact your legislation and allow competition to flourish – subject only to constraints imposed by our antitrust laws – in the same way they do in the rest of our economy.") and *Statement of Charles James, Ass't Atty. Gen., before the Committee on the Judiciary, U.S. House of Representatives, concerning H.R. 1253, the Free Market Antitrust Immunity Reform Act of 2001*, at 7-8 (June 5, 2002), https://www.justice.gov/archive/atr/public/testimony/11244.pdf ("The Department of Justice believes that the proposed legislation would firmly establish competition as the touchstone for this important industry. We believe that the ocean shipping marketplace can benefit, no less than other industries, from healthy competitive market forces safeguarded by appropriate antitrust enforcement."). *See also,* the American Bar Association's monograph on Federal Statutory Antitrust Exemptions finding that the arguments traditionally asserted to justify the exemption (i.e., ruinous competition due to overcapacity) are dubious and concluding that the conferences (agreements among ocean carriers) "typically result in inefficiently high rates" and have at least "some ability to inflate prices." Peter Carstensen & Christopher Sagers, ABA Section of Antitrust Law, Federal Statutory Exemptions from Antitrust Law (2007).

[26] The White House Briefing Room Blog, *Recent Progress at Our Ports: Moving Cargo and Filling Shelves* (Nov. 17, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/11/17/recent-progress-at-our-ports-moving-cargo-and-filling-shelves/.

[27] Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb 28,2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/.

carriers have frequently refused to honor rate and capacity commitments in shippers' existing negotiated service contracts in order to take advantage of dramatically higher rates on the non-contract spot market. For example, the spot rate for a 40-foot container to the U.S. from Asia exceeded $20,000 last year, which was over a 500% increase from 2020, and 14 times higher from 2019.[28] Carriers' refusal to honor existing contracts, leaves shippers no alternative but to go to the spot market as well, and pay exorbitant rates—sometimes for the exact same capacity slot they were denied at their original contract rate. Longer-term rates set in contracts between carriers and shippers were running an estimated 200% higher in 2021 than in 2020.[29] For some retailers, "[s]ometimes the ocean freight now is actually more expensive than the cost of the product."[30]

Higher ocean freight rates combined with additional fees and accessorials contribute to retailers experiencing a total cost per container sometimes as high as 1,000% more than pre-pandemic levels.[31] Such fees include assessments of detention and demurrage (even when cargo owners cannot get access to their containers to move them), import dwell fees threatened by particular ports, and individual marine terminals that have charged shippers dwell fees, despite having no contractual relationship. The Federal Maritime Commission estimates that from July to September of 2021, eight of the largest carriers charged customers fees totaling $2.2 billion—a 50% increase from the previous three-month period.[32]

These historically high shipping prices translate directly into higher prices for American consumers. Based on research by the Kansas City Federal Reserve Bank and the European Central Bank, the increase in shipping costs alone is expected to contribute to a 1% increase in consumer prices over the next year.[33]

C. Current Efforts to Address Supply Chain Disruptions and the Role of the FTC

Last year, President Biden's Executive Order on Promoting Competition in the American Economy launched a "whole-of-government" effort to increase competition in the U.S. marketplace.[34] The order specifically recognized the negative impact that ocean carrier conduct is having on the U.S. economy, noting that "powerful container shippers" have been charging

[28] Roslan Khasawneh and Muyu Xu, *China-U.S. container shipping rates sail past $20,000 to record*, Reuters (Aug. 5, 2021 11:13 PM EDT), https://www.reuters.com/business/china-us-container-shipping-rates-sail-past-20000-record-2021-08-05/; https://www.wsj.com/articles/rising-shipping-costs-are-companies-latest-inflation-riddle-11631784602.

[29] Lauren Etter and Brendan Murray, *Shipping Companies Had a $150 Billion Year. Economists Warn They're Also Stocking Inflation*, Bloomberg (Jan. 18, 2022), https://www.bloomberg.com/news/features/2022-01-18/supply-chain-crisis-helped-shipping-companies-reap-150-billion-in-2021.

[30] Thomas Gryta, *Rising Shipping Costs Are Companies' Latest Inflation Riddle*, The Wall Street Journal (Sept. 16, 2021), https://www.wsj.com/articles/rising-shipping-costs-are-companies-latest-inflation-riddle-11631784602.

[31] Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/.

[32] *Id.*

[33] *Id.*

[34] Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

"exorbitant fees," which can add up to thousands of dollars, for time their freight was sitting waiting to be loaded or unloaded.[35] The Executive Order encourages the FMC to "ensure vigorous enforcement against shippers charging American exporters exorbitant charges"[36] in order to tackle one of the root causes of supply chain disruptions.

Just last month, recognizing the critical importance of competition in the maritime industry and its integral role in lowering prices, improving the quality of service and strengthening the resilience of supply chains, the White House announced a new joint initiative by the DOJ and the FMC to promote competition in the ocean freight transportation system through aggressive enforcement of the Shipping Act and related laws as well as Sherman Act and Clayton Act enforcement actions.[37] RILA fully supports all of these important initiatives.

There have been legislative efforts to tackle these problems as well. The proposed Ocean Shipping Reform Act (OSRA), which passed the House late last year and is now under consideration by the Senate, would give more enforcement power and resources to the FMC to act against ocean carriers that behave anticompetitively.[38] If passed, among other things, OSRA would deter unfair detention and demurrage charges assessed by ocean carriers. RILA, along with other trade associations representing major U.S. shippers, has publicly supported passage of OSRA.[39]

While the FMC has primary statutory authority over ocean carriers, we believe that the FTC also has a role to play in addressing anticompetitive behaviors in the shipping industry. For example, the FTC could use its considerable expertise on the Sherman and Clayton Acts to help the ongoing DOJ/FMC efforts to promote competition in the shipping industry through enhanced enforcement actions. In addition, the FTC could use its authority under Section 6(b) of the FTC Act to study how the consolidation of the shipping industry and formation of the top three trans-Pacific shipping alliances has affected industry dynamics including price, capacity and level of service as well as to study whether certain agreements among ocean carriers should remain

[35] Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[36] *Id.*

[37] Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb 28,2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/. *See also*, DOJ Press Release: Justice Department and Federal Maritime Commission Sign Memorandum of Understanding to Support Interagency Collaboration (July 12, 2021), https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-sign-memorandum-understanding-support.

[38] H.R. 4996, S.3580.

[39] RILA Press Release: Leading Retailers Welcome Oversight of Ocean Carriers (Dec 8,2021), https://www.rila.org/focus-areas/public-policy/retailers-welcome-oversight-of-ocean-carriers. *See also e.g.*, American Apparel & Footwear Association statement, National Retail Federation Statement, Laura Husband, *US apparel industry backs Senate on shipping reform bill*, Just-Style.com (Feb. 4, 2022), https://www.just-style.com/news/us-apparel-industry-supports-senate-introducing-ocean-shipping-reform-bill/ and the Consumer Technology Association Press Release, CTA Applauds House Passage of Ocean Shipping Reform Act (Dec. 8, 2021) https://www.cta.tech/Resources/Newsroom/Media-Releases/2021/December/CTA-Applauds-House-Passage-of-Ocean-Shipping-Refor.

immune to antitrust scrutiny. This 6(b) study could then inform Congress as to whether any changes to the antitrust exemption would be appropriate.

V. Category Captains and Slotting Allowances

The FTC's Solicitation for Public Comment specifically asks for an assessment of the impact, if any, of category captains and slotting fees on the current supply chain disruptions and the allocation of supplies of products that retailers purchase or sell. As explained below, we do not believe these common practices play any role in the supply chain disruptions currently under study.

Retailers have utilized these practices as an efficient way to sell products for decades — well before the current extraordinary supply chain crises arose — without any associated supply chain disruptions. In contrast, there are multiple obvious and major factors outlined above that are causing supply chain disruptions. There simply is no evidence to suggest, much less support, a causal link between the longstanding industry practices related to category captains and the massive supply chain disruptions that have emerged in the past two years.

Indeed, the FTC has been well aware of these practices for at least two decades. In 2000-2001, for example, the FTC conducted a workshop and issued a detailed report concluding that these practices could be procompetitive. Specifically, the FTC report concluded that:

> "[T]he record strongly suggests that category management and the use of category captains can produce important efficiencies, and there was agreement that FTC actions should not call these practices into question in any general way."[40]

In 2003, the FTC also issued a report on slotting allowances after receiving information from seven retailers. The report concluded that, "without having additional information about other characteristics of a new product introduction, it is not possible to determine with confidence which, if any, of the discussed economic theories best explain why suppliers pay retailers slotting fees."[41] No evidence has been produced in the intervening years to change this conclusion and, since these practices existed long before the current supply chain disruption, they cannot plausibly be identified as causing the current inflationary environment.

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[40] Report on the FTC Workshop on Slotting Allowances, at 71 (February 2001), https://www.ftc.gov/sites/default/files/documents/reports/report-federal-trade-commission-workshop-slotting-allowances-and-other-marketing-practices-grocery/slottingallowancesreportfinal_0.pdf.

[41] Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories (Nov. 2003), at 65, https://www.ftc.gov/sites/default/files/documents/reports/use-slotting-allowances-retail-grocery-industry/slottingallowancerpt031114.pdf.

CONCLUSION

RILA fully supports the Federal Trade Commission's mission and goal of promoting competition in the U.S. marketplace and appreciates the opportunity to provide these comments to aid in the Commission's study of supply chain disruptions. If you have any questions or need any additional information, please contact Kathleen McGuigan, EVP & Deputy General Counsel at kathleen.mcguigan@rila.org or Jess Dankert, VP Supply Chain at jess.dankert@rila.org.

Respectfully submitted,

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