

As the Commission conducts its periodic review of rules and regulations, it is important to reconsider the Retail Food Store Advertising and Market Practices rule (Unavailability Rule.) Since the Commission amended the rule in 1989, the retail food store industry has changed dramatically. These changes, which will be described below, compel the Commission to amend the Unavailability Rule in the following ways: the Commission should eliminate the Unavailability Rule for all geographic regions not designated as “food deserts.” For retail food stores operating within “food deserts,” the Unavailability rule should not only remain in effect to protect vulnerable consumers, but should be expanded to encompass non-traditional food stores.

The retail food store industry has changed significantly since the Unavailability Rule was first enacted in 1971 and amended in 1989. Traditional retail food stores have expanded: there are currently 92,300 grocery stores in the United States.¹ An increase in the number of grocery stores would suggest increased competition. But is this the case? Indeed, the retail food store industry is, for the most part, highly competitive. For example, heightened competition forced Kroger Co., one of the largest grocery stores in the country, to recently slash prices in a so-called “competitive pricing” scheme designed to retain customers.² These consumer-friendly measures may portend depressed earnings for investors, but they demonstrate that even the biggest retail food stores are not immune to market pressures.

Another development in the retail food store industry is increased competition from non-traditional food stores, such as supercenters and drugstores. One study found that non-traditional food stores have increased their share of food sales relative to traditional food stores from 17.1 percent in 1994 to 31.6 percent in 2005.³ This finding indicates that retail food store giants like

Kroger face pressure not only from other traditional food stores, but also from non-traditional food stores like CVS and Wal-Mart.

Aside from industry statistics, personal anecdotes can be used to assess the competitiveness of the retail food industry. Lending credibility to the argument that consumers have choice in a highly competitive industry, one commenter from Ohio noted: “People respect my ability to squeeze the most out of the shopping experience...The trick is to wait for a coupon. Then you benefit from the sale price and the coupon, for double savings. As long as rain checks are issued, I don't see a problem.”⁴ Comments such as the above demonstrate the capacity for consumers to exercise choice in a competitive marketplace. Another commenter expressed disgust with her grocery store but alluded to her choice to punish the deceptive business: “There is a consistent issue with the Pittsburg CVS Pharmacy in Atlantic Plaza, Pittsburg CA not having in stock the items which are displayed... I now totally disregard ANYTHING they advertise as being a bait and switch tactic.”⁵ If this consumer is so thoroughly dissatisfied with her service at the CVS in Pittsburg, she is capable of exercising free will and taking her business elsewhere.

Over the years, retail food store industry has expanded, competition between traditional retail food stores has intensified, and non-traditional food stores have emerged as credible competitors to traditional grocery stores. These developments suggest the Commission should eliminate the Unavailability Rule altogether, as consumers don't need the government to protect them from deceptive business practices if a highly competitive market exists to police the transgressors. Nevertheless, millions of low-income Americans still live in so-called “food deserts” that make it difficult for them to access affordable and healthy food choices.⁶ In the absence of choice, consumers can fall prey to predatory business practices. This is why the

Commission should make an exception for designated food deserts, while scrapping the Unavailability Rule for the rest of the country.

Coined by the Agriculture Department's Economic Research Service, food deserts are defined as low-income areas where the nearest grocery store is more than 1-mile away.⁷ In these areas, access to food can be difficult. The problem is compounded for consumers who not only live far away from a grocery store, but also live in low-income neighborhoods, and have low personal incomes themselves. Data show that 11.4 million Americans have low incomes and live in low-income neighborhoods that are more than a mile from the nearest grocery store.⁸ Since 11.4 million people account for only 4.1 percent of the total U.S. population, it would be imprudent to maintain a rule that applies to everyone if it only affects a small number of people. Instead, the Commission should focus its attention on the most vulnerable among us – those who live in food deserts – and eliminate the Unavailability Rule in every other segment of the country. The Commission should also expand the definition of retail food store to include non-traditional food stores, as such stores have increased their foothold into the retail grocery market. These steps would focus the federal government's role within this sector of the private economy on instances of market failure.

If adopted, these recommendations would help ensure that all Americans have access to affordable food choices and won't be subjected to the whim of predatory food stores that are insulated from competition.

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