

March 15, 2022

Minnesota Commerce Committee

Opposition to HF 4142's Harmful Effects on Minnesota Consumers

Rep. Zack Stephenson, Chair
Commerce Committee
Minnesota House of Representatives

Dear Chair Stephenson & Members of the Committee:

Thank you for the opportunity to submit testimony. We ask that you vote **against** HF 4142 because it:

- Punishes sellers for using widespread and pro-consumer business practices; and
- Hurts Minnesotans, especially low-income families who rely on discounts and bargains to make ends meet.

First, “price discrimination” simply means price differentiation—the charging of different prices to different customers.¹ Nearly all sellers use price differentiation—businesses often give discounts to customers who pay their bills electronically, shop or use services at certain hours, buy in bulk, or buy frequently (loyalty programs)—as a means of competing in the marketplace. Under HF 4142, however, these widespread business practices could be unlawful.

To be sure, HF 4142 tries to limit its scope with specific exclusions. But these exclusions do little to mitigate the uncertainty this bill will unleash. To the contrary, the exclusions underscore the bill’s dramatic impact. The bill recognizes, for example, that market forces may require sellers to change their prices. But it limits the exclusions to situations outside the seller’s control.

The inverse of that means sellers are prohibited from *voluntary* use of price differentiation to benefit consumers. In other words, if a seller believes a price differential may entice new customers and help grow the business, and voluntarily chooses to do just that, he or she will likely have run afoul of HF 4142. This is a shame because such efforts benefit consumers by lowering prices on products and services that they value most. It also allows consumers to determine the tradeoffs between convenience, service, and price—which is far more consistent with a free-market economy.

And this bill would make price discrimination presumptively unlawful and ultimately raise the cost to consumers, all to protect competitors. Rather than require plaintiffs to show that the practice hurt consumers, the bill requires defendants to rebut the plaintiffs’ allegations creating a high bar and burdensome litigation for a party accused of a violation.

Second, this bill threatens to stifle procompetitive price differentials that benefit consumers. In fact, price discrimination laws, including the federal version passed in 1936², trace their roots to populist critiques of chain stores like A&P grocery stores. Both then and now, critics claim that it is inherently unfair for large businesses (how large? they rarely specify) to negotiate better terms with suppliers or to offer discounts to certain buyers, because smaller businesses are more

¹ *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 103 (10th Cir., 1973) (citing *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960)).

² Known as the Robinson-Patman Act.

limited. In fact, from A&P to Sears to big box stores like Minnesota's own Target, the history of retail shows that innovation that benefits consumers often elicits claims of being anticompetitive conduct.

To be sure, not all businesses can afford price differentials. But that is not an antitrust problem. Indeed, antitrust specifies that the market is best served by allowing businesses to compete vigorously for consumers, including by using price differentials. To do otherwise would be to withhold benefits from consumers and raise prices at a time when many consumers are facing challenging times with the pandemic and inflation.

While some might argue that those benefits don't outweigh the cost (e.g., some businesses will fold from increased competition), that utterly ignores the fact that low-income and middle-class families rely on discounts and bargains to make ends meet. Indeed, Target's critics have long argued that it, along with Walmart and other large retailers, unfairly compete by leveraging their market power to extract favorable terms from suppliers and have destroyed small competitors in the process. But the reality is retailers compete on a variety of metrics beyond price to distinguish themselves. Consumers of all income groups, but especially the working class, benefit most from these discount programs and fierce competition.

Thankfully, Target's critics have failed largely because most recognize the immense consumer benefits that come from vigorous competition. This vigorous competition encourages retailers to attract loyal customers through a variety of metrics and innovative options. Unfortunately, HF 4142 would punish that vigorous competition for customers and would punish businesses *precisely because* they lowered costs for consumers.

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Because HF 4142 contravenes decades of economic literature, and punishes common practices that increase competition and benefit consumers, it should not become law. We therefore respectfully ask that you not pass HF 4142.

Thank you for the opportunity to testify, and please contact me if you have any questions or concerns.

Respectfully submitted,

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NetChoice

NetChoice is a trade association working to make the internet safe for free enterprise and free expression.