



Comments Received by the Department of
Consumer and Worker Protection on

Proposed Rules related to Item Pricing

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FOOD INDUSTRY ALLIANCE OF NEW YORK, INC.

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**Testimony by the
Food Industry Alliance of New York State, Inc.
Amendment of Item Pricing Requirements for Retail Stores
Reference Number 2022 RG 008
March 21,**

2022

Thank you for the opportunity to testify on behalf of the Food Industry Alliance of New York State, Inc. (FIA) regarding proposed rule amendments titled “Amendment of Item Pricing Requirements for Retail Stores,” Reference Number 2022 RG 008 (Proposed Rule Amendments). FIA is a nonprofit trade association that advocates on behalf of grocery, drug and convenience stores throughout the state. We represent a broad spectrum of the NYC retail food sector, from independent, neighborhood grocers to large chains, including many unionized stores.

Requested language changes are highlighted in yellow.

These rule amendments were proposed by the Department of Consumer and Worker Protection to implement Local Law 129/2021 (LL-129), approved by the NYC Council by a 36-1 vote. LL-129 added a fifteenth category of exempt items under the city’s item pricing law, codified as section 20-708.1(c)(15) of the NYC Administrative Code. The vote reflected the near unanimous consensus of the Council that, due to technological and regulatory developments after the city’s item pricing law was enacted in 1991, a broad exemption category was long overdue, since such changes provided grocery store customers with the ability to identify prices without having to look for a tiny label on hundreds of items in a store.

These improvements included redundant disclosure of accurate item price information through integrated, computerized price systems that are updated in real time. Easy-to-read monitors were installed at checkout, allowing customers to review item prices at the point of sale. The state unit pricing law, requiring tags containing unit and retail prices be affixed to shelves, and price accuracy statute, mandating at least 98% price accuracy, were enacted. As a result, for decades customers have not had to rely on tiny labels to ascertain the price of an item.

New York State, one of only seven states that required item pricing at the time, permitted its statewide item pricing law to expire on June 30, 1991, allowing localities to decide whether item pricing should be mandated. Because customers were not relying on item marking to identify prices, nearly all of New York’s municipalities have either not required item pricing for decades or provided broad exemption options. For example, Suffolk, Westchester and Nassau counties amended their laws in 2008, 2010 and 2011, respectively, to allow grocers to avoid item

marking, acknowledging that item marking was not necessary to communicate accurate item price information to customers.

Considering this history, the Proposed Rule Amendments seem to be a solution in search of a problem. Item pricing did not fix any price transparency issues in grocery stores; the foregoing technological and regulatory developments did. The Proposed Rule Amendments, however, incorrectly assume that the creation of the item marking exemption under LL-129 will make it difficult for customers to discern accurate item prices. This is why proposed section 5-116(b), by requiring that “A price scanner for consumer use must be located within 30 feet of *any item sought to be exempted* from item pricing in accordance with this section... (emphasis added),” effectively requires a grocery store with hundreds of exempt items to purchase, install and maintain the maximum of 10 price scanners per store. This is not feasible, since this option will cost grocers tens of thousands of dollars per store over time, in a business where earning a penny on the dollar is standard. This course of action will also clutter small, neighborhood grocery stores with a far larger number of customer price scanners than will ever be used.

Proposed section 5-116(c) provides the only other option allowing grocers to rely on the exemption contained in section 20-708.1(c)(15). Section 5-116(c) states that “If a price scanner for consumer use is located more than 30 feet from an item sought to be exempted from item pricing in accordance with this section, a prominent and conspicuous sign must be posted *within view of such item* stating (emphasis added) ...” If “within view of such item” allows grocers to hang the required sign from the ceiling, so that there is one sign per aisle, then this requirement is reasonable. Assuming that is the case, we respectfully request that proposed section 5-116(c) be amended to state “If a price scanner for consumer use is located more than 30 feet from an item sought to be exempted from item pricing in accordance with this section, a prominent and conspicuous sign must be posted within view of such item stating: “A Price Scanner for Customer Use to Check Prices is Located (location of price scanner). **Such requirement may be satisfied by hanging such sign from the ceiling of an aisle.**”

However, if a sign must be affixed on the shelf next to each stock keeping unit (as defined in LL-129) for which an exemption is sought, then this provision is not workable. Combined with the issues raised by the provisions of proposed section 5-116(b), grocers would be left with no realistic way of complying with the Proposed Rule Amendments, which would effectively nullify the exemption in LL-129. This would thwart the will of the Council which, by a 36-1 vote, intended to make a broad exemption from the law’s onerous item marking requirements available to retailers on reasonable terms.

The broad exemption added under LL-129 applies to “Any stock keeping item that is capable of being scanned, and which is sold, offered for sale, or exposed for sale at a retail store that has, as determined by rule of the commissioner, a sufficient number, *in proportion to the retail store size*, of clearly marked and functioning price scanners for consumer use, in adequate locations (emphasis added).” Retail store size in the NYC retail food sector is determined solely by square footage. Rent and other lease obligations, the amount of inventory on hand as well as fixtures and refrigerated equipment to install and the layout of the store are all based on square footage, not the number of checkout stations. Many checkout stations in a store are not used most of the time; some are only used during major holidays.

Despite this, the Proposed Rule Amendments state that to rely on the exemption provided in section 20708.1(c)(15) of the Administrative Code "...a retail store must have at least as many price scanners for consumer use as the retail store has checkout stations..." This mandate exceeds the department's statutory authority, since the number of checkout stations in a store is not used to measure a store's size.

Rather, store size is exclusively determined by square footage.

Nassau County's customer price scanner requirements have protected consumers since 2011 without imposing unnecessary costs and burdens on retailers. Enacted as part of its broad item pricing exemption, Section 21-18.3.1(g)(i) of the Nassau County Administrative Code provides the following customer price check scanner requirements:

- Up to 20,000 square feet: 1 scanner required;
- Between 20,001 and 30,000 square feet: a minimum of 2 and such additional scanners as the Commissioner may deem appropriate;
- Between 30,001 and 60,000 square feet: a minimum of 3 and such additional scanners as the Commissioner may deem appropriate;
- Between 60,001 and 90,000 square feet: a minimum of 4 and such additional scanners as the Commissioner may deem appropriate; and
- Over 90,000 square feet: a minimum of 5 and such additional scanners as the Commissioner may deem appropriate.

The foregoing customer scanner requirements are based on square footage, not the number of checkout stations per store. The customer price scanner requirements in Westchester and Suffolk counties are also not based on the number of checkout stations in a store. Moreover, the Nassau statute states that "The number of price check scanners shall be dependent on the stores *retail areas*...(emphasis added)". "Retail area" means a store's selling area (where products are offered for sale to customers), rather than gross area. Finally, since the foregoing provisions were enacted in 2011, the Nassau County Commissioner of Consumer Affairs has not revised the customer scanner requirements. This means that the required number of customer price scanners per store has created the right balance, allowing customers to conveniently check prices without cluttering stores and unnecessarily imposing costs on grocers.

Accordingly, we respectfully request that the provisions of proposed section 5-116(d) of the Proposed Rule Amendments be deleted in their entirety and replaced with the following: (d) To comply with the requirements of this section, a retail store must have price scanners for consumer use as follows:

- Up to 20,000 square feet: 1 scanner required;
- Between 20,001 and 30,000 square feet: a minimum of 2 and such additional scanners as the Commissioner may deem appropriate;
- Between 30,001 and 60,000 square feet: a minimum of 3 and such additional scanners as the Commissioner may deem appropriate;
- Between 60,001 and 90,000 square feet: a minimum of 4 and such additional scanners as the

Commissioner may deem appropriate;
and

- Over 90,000 square feet: a minimum of 5 and such additional scanners as the Commissioner may deem appropriate.

Historically, the city's item pricing law has been primarily enforced against grocers. It is therefore important that the city's food retailers support the Proposed Rule Amendments. FIA and its members will support the Proposed Rule Amendments if they are revised as requested. Should the department choose not to make the changes we are seeking, please withdraw the rule so that the significant issues raised in this testimony can be addressed collaboratively.

Thank you for considering our testimony.

Respectfully submitted,

Food Industry Alliance of New York State, Inc.

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**May 2,
2022**



May 2, 2022

New York City Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004

Re: Local Law 129's Price Scanner Exception Requirements regarding Distribution of Scanners in stores

Dear Department of Consumer and Worker Protection:

The National Supermarket Association (NSA) is a trade association that represents the interest of independent supermarket owners in New York and other urban cities throughout the East coast, Mid-Atlantic region and Florida. In the five boroughs alone, we represent over 400 stores that employ over 15,000 New Yorkers. Our members work hard every day to run their businesses, support their families and provide jobs and healthy food options to their communities.

We write to you today with our comments regarding **§5-116(d) of the Proposed Rule Amendments** for [Intro 1145-2018](#), or Local Law 129 of 2021 ("LL 129").

The NSA worked tirelessly to pass LL 129, and we commend the Department of Consumer and Worker Protection and City Council for their tremendous efforts in passing and working to implement this legislation. Supermarket owners will experience immense relief because of LL129, exempting them from individually marking items for sale if price scanners are readily available for consumer use. The new exception will save our businesses from enormous fines and make our employees more efficient, which benefits everyone including the consumer.

However, we would like to pose a concern on the language of the Proposed Rule Amendments by the Department. §5-116(d) states the following:

“To comply with the requirements of this section, a retail store must have at least as many price scanners for consumer use as the retail store has checkout stations, except that in no event does a retail store need to have more than 10 price scanners for consumer use to comply with this section”

Basing the amount of scanners in each store on checkout stations will clutter and burden our small, neighborhood supermarkets with a greater amount of price scanners than customers that will be able to use them. We believe that, in order to more fairly represent our stores, **that the**

amount of scanners should be based on square footage of the supermarket rather than the amount of checkout stations.

Check out stations are inaccurate representations of store size, as not all checkout stations are operative most of the time. Retail size in the New York City retail food sector is solely based on square footage, evident in official business documents such as lease obligations and inventory counts. Furthermore, **only retail area square footage where items are sold to consumers should be accounted for**, and not total store area size. Altering the language of §5-116(d) of the Proposed Rule Amendments to take square footage into account instead of checkout stations will simply make more sense for our independent small businesses and consumers alike.

NSA respectfully requests the Department of Consumer and Worker Protection to consider this small tweak when finalizing the rule.

Again, we thank you for your time and consideration and we look forward to moving forward with the long sought implementation of this law which will create much relief to our independent supermarkets.

Sincerely,

Nelson Eusebio

Nelson Eusebio
Director of Government Relations
National Supermarket Association