

Federal Trade Commission Investigating Ongoing Baby Formula Shortage

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On May 23, the Federal Trade Commission announced that it will launch an investigation of the reasons behind the nationwide shortage of baby formula that is distressing parents, grandparents and childcare providers. The FTC is hoping to unearth the factors that have contributed to the consolidation of the baby formula market and the pertinent issues with the supply chains for baby formula.

Baby formula has been increasingly difficult to find in the United States after a major plant shut down in February due to alleged contamination by bacteria. That closure was prompted by a whistleblower complaint followed by a belated Federal Drug Administration investigation. On May 16, a consent decree was entered into with the FDA regarding that plant shutdown, which set conditions the plant must comply with to resume operation. Additionally, the Biden administration has invoked the Defense Production Act that will prioritize the delivery of ingredients used to produce baby formula and is airlifting the equivalent of 1.5 million eight-ounce bottles of formula into the United States from Germany and other countries.

Last week, President Joe Biden brought executives of baby formula companies to the White House to address the crisis and a plan to fix it. At the same, time Biden prompted the FTC to investigate the root causes of the shortage. The FTC will investigate the mergers and acquisitions that have led to the nationwide consolidation in the baby formula

industry. The FTC will also examine supply-chain issues as a possible cause of the baby formula shortage, which may have resulted, in part, from either FDA and other agency regulations that limit the total manufacturing capacity of producers, and impose high tariffs on imported formula and other FDA labeling requirements. Furthermore, the FTC is taking a closer look at possible high barriers to entry in the baby formula industry. The USDA's Special Supplement Nutrition Program for Women, Infants, and Children, also known as WIC, has been raised as a possible issue because it may have facilitated lower pricing for formula, but the program's single source contracting methodology may have made it much more difficult for other formula producers to compete with the contracting companies. In addition, studies have shown that WIC contracting companies may also see a bump in sales in the non-WIC market. The WIC single sourcing contracts combined with perceived government favoritism may have produced anti-competitive outcomes in the baby formula market as a whole. Finally, the FTC will investigate those who might have tried to benefit from the shortage through scalping, reselling formula at exorbitant prices, curtailing production or supply of formula or hoarding product to increase demand and drive up prices.

While the FTC has launched this inquiry into the baby formula shortage, any potential anti-competitive problems with the baby formula market the FTC uncovers, if not voluntarily resolved, would entail lengthy judicial proceedings. That entire process could take years and would only result in injunctive relief against wrongdoers. The FTC investigation has increased congressional attention on consolidation in the food industry generally which, in turn, may lead to other solutions geared toward encouraging more competition in the food industry.

The focus on the baby formula shortage comes as the Biden administration and many lawmakers have been critical of and concerned about the competitiveness of the food industry in general. In September 2021, the White House briefed the public on its concerns regarding the increasing prices of meat in the United States. The briefing explained that just four large conglomerates control the majority,

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namely 55%-85%, of the market for beef, pork and chicken processing. Those conglomerates serve as the middleman between farmers and ranchers, and grocery stores, thereby functioning as a possible chokepoint in the supply chain. The four conglomerates identified not only allegedly raised prices during the COVID-19 pandemic, but many also have recorded their highest net incomes and gross profits in history. The White House stated that in its view the simultaneous increase in pricing and profitability is the direct result of a general lack of competition in the food industry.

In response, both the USDA and DOJ have taken actions to counteract potential price fixing and other violations of the antitrust laws, and to increase transparency within the meat-processing industry. The DOJ and the USDA indicted Pilgrim's Pride, owned by JBS, resulting in a \$107 million guilty plea in February. Pilgrim's Pride admitted to participating in a conspiracy to fix prices and to rig bids for broiler chicken products in violation of the Sherman Act. The DOJ has also announced numerous other indictments of poultry industry executives in relation to price fixing accusations pertaining to broiler chickens.

Additionally, on May 19, Congress introduced a bipartisan resolution requesting that the FTC investigate beef companies for potential price fixing. The resolution would require the FTC to respond within one year as to the state of competition within the beef packing industry.

This latest government investigation of supply shortages has the potential to ensnare even indirect supply chain participants in the baby formula industry, who may be the recipients of burdensome civil investigative demands and subpoenas from the FTC, and other state enforcers, as the investigation drills down on the problems to worried consumers. Stay tuned.

—*John O. Hillman, a summer law clerk at the firm, contributed to the preparation of this article.*

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