Congress of the United States
U.S. House of Representatives
Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515–6315

MEMORANDUM

TO:	Members, House Committee on Small Business
FROM:	Nydia Velázquez, Chairwoman
DATE:	March 1, 2022
RE:	Full Committee Hybrid Hearing: "Competition and the Small Business Landscape: Fair Competition and a Level Playing Field"

The Committee on Small Business will meet for a hybrid hearing titled "Competition and the Small Business Landscape: Fair Competition and a Level Playing Field." The hearing is scheduled to begin at **10:00 A.M. on Tuesday, March 1, 2022, in person in 2360 Rayburn House Office Building and via the Zoom platform.**

Antitrust laws exist to promote competition and prohibit anti-competitive behavior by large firms. However, the U.S. economy has seen continued concentration among its industries since the 1970s. Although this issue is traditionally viewed through the lens of consumers, consolidated industries can be particularly harmful to small firms and new startups. This hearing will examine the history of antitrust law and the historical importance of encouraging fair competition and their potential impacts on small firms. Members will hear from a variety of experts about competition policy through the lens of American small firms.

Panel

- Dr. Diana L. Moss, President, American Antitrust Institute, Washington DC.
- Dr. Carl Shapiro, Distinguished Professor of the Graduate School at the University of California at Berkeley, CA.
- Mr. Barry Lynn, Executive Director, Open Markets Institute, Washington, DC.
- Dr. Douglas Holtz-Eakin, President, American Action Forum, Washington, DC.

Background

Since 1890, the U.S. Government has been involved in creating and enforcing laws that promote competition and restrict monopolies. These laws are rooted in the notion that healthy market competition is a fundamental aspect of a well-functioning economy. Greater competition, or the presence of more firms within a market leads to lower prices, higher quality goods and services, greater variety, and more innovation. The small business economy rests on the foundation that competition promotes more efficient allocation of resources. However, recent market trends have shown a decades-long decline in the number of new business startups alongside increasing consolidation in 75 percent of U.S. industries.

When industries consolidate, or concentrate into fewer firms, the larger firms tend to garner market power, or the ability to profitably raise prices without losing customers to competing firms. The ability for single firms to price gouge consumers led to government involvement in these practices. There are three main antitrust laws in America that prohibit monopoly power and encourage fair competition in the economy. First, the Sherman Antitrust Act of 1890 (Sherman Act), was passed due to concerns about the power of large trusts like U.S. Steel and Standard Oil. It contains two substantive provisions that prohibit agreement in restraint of trade, or anti-competitive practices, and the prohibition of monopolization. Second, the Clayton Antitrust Act of 1914 (Clayton Act) bars certain forms of price discrimination and mergers that are likely to harm competition. Finally, the Federal Trade Commission Act of 1914 (FTC Act) protects consumers from unfair, deceptive, or fraudulent practices, and aims to prevent unfair methods of competition.[1]

Small Businesses and Competition

Small businesses are the bedrock of the American economy, accounting for 99 percent of all private sector employers,[2] generating roughly two-thirds of all new jobs, and driving 44 percent of U.S. economic activity.[3] They are often started by entrepreneurs who seek to engage in commerce by marketing their goods or services as superior in some way to their competition's goods or services. More small businesses entering the market often drives the creation of new jobs and commercialization of new technology. Overall, small firms tend to allocate resources more efficiently and contribute to greater labor productivity.[4]

Aside from the uptick in new business registrations over 2020 and 2021, the share of small firms entering the market had been declining since the early 1980s. A Congressional Budget Office report from December 2020 found that from the period of 1982 to 2018, the rate at which firms were created decreased from 10 percent of all businesses to 8 percent, and the share of employment belonging to new firms (less than five years old) fell from 14 percent to 9 percent.[5] In 1982, new firms constituted 38 percent of all businesses, but fell to only 29 percent in 2018.[6] Finally, in 2018, the rate at which firms were exiting the market out-paced the rate at which firms entered (shown in Figure 1 below).[7]

[1] Of note, since the Federal Trade Commission does not explicit authority to enforce the Sherman Act, the agency can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. Only the Commission can bring cases on the FTC Act.

[2] U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, FAQ, Sept. 2012.

[3] U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, Release No. 19-1 ADV, SMALL BUS. GENERATE 44 PERCENT OF U.S. ECONOMIC ACTIVITY, (2019).

[4] U.S. CONG. BUDGET OFF., Report No. 56906, FED. POLICIES IN RESPONSE TO DECLINING ENTREPRENEURSHIP, (2020).

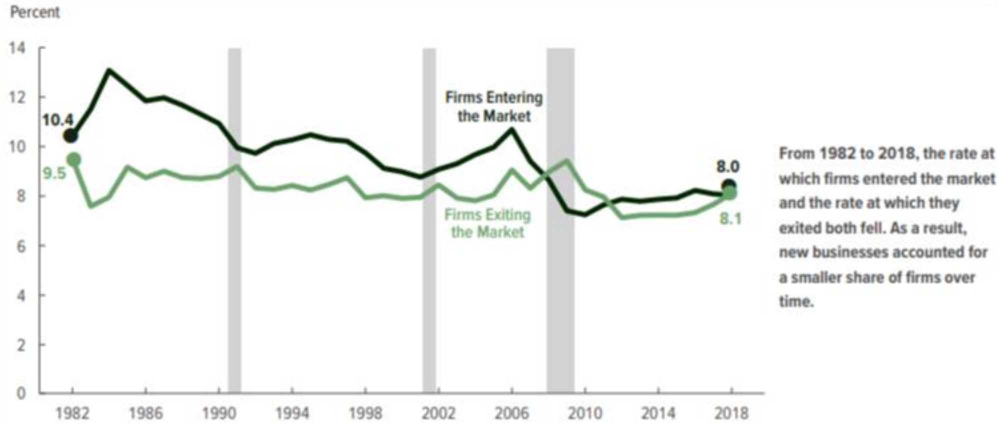
[5] *Id.*

[6] *Id.*

[7] *Id.*

Figure 1.

Rates at Which Firms Entered and Exited the Market, 1982 to 2018



Data source: Congressional Budget Office, using data from the Census Bureau's Business Dynamics Statistics. See www.cbo.gov/publication/56906#data.

Moreover, there has been a continuing concentration within industries over the past two decades. Seventy-five percent of U.S. industries have experienced an increase in concentration levels, and the average increase in concentration has reached 90 percent.[8] For example, the market share of the largest public and private firms in most industries has grown significantly, and the largest players in the economy have tripled in real terms.[9] Moreover, these concentrated industries are becoming more profitable predominantly through higher profit margins, rather than via greater efficiency.[10]

Not only does the increasing market share of large corporations make it increasingly difficult for many new and small businesses to compete on a fair playing field, but this concentration can also negatively impact consumers in the form of higher prices and lower quality goods.

Foundations of Antitrust Law

The Sherman Antitrust Act of 1890

The U.S. Congress plays a critical role in competition policy. In 1890, Congress passed the first antitrust law, the Sherman Act, as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[11] The Sherman Act contains two main substantive provisions, outlawing "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[12] As developed by case law, the Sherman Act does not prohibit *every* restraint of trade, only those that are deemed to be an *unreasonable* restriction of trade.[13] Some actions, such

[8] Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Indus. Becoming More Concentrated*?, 23 OXFORD REV. OF FINANCE, 4, 697-743 (2019).
[9] *Id*.
[10] *Id.*
[11] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38 (2018).
[12] *Id.*
[13] FED. TRADE COMM'N, GUIDE TO ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Feb. 14, 2022).

as price fixing, dividing markets, or rigging bids are considered "*per se*" violations of the Sherman Act, and so harmful to competition that they are almost always illegal.[14]

The Clayton Antitrust Act of 1914

Building on the Sherman Act, the Clayton Act bars certain forms of price discrimination and mergers that are likely to harm competition. The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit. Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[15] Section 7 applies to both "horizontal" mergers between competing companies and "vertical" mergers between companies that operate in different spheres.[16] Horizontal merger cases generally require courts and regulators to analyze and define a relevant antitrust market in order to assess whether a merger between companies will harm competition.[17] Vertical mergers raise different antitrust concerns, when a firm with significant power in one market seeks to acquire a company within another market. Such mergers may be anticompetitive when the resulting vertical integration would raise barriers to market entry for other firms or potentially deny like competitors' access to vital goods or services.[18]

The Federal Trade Commission Act of 1914

The Federal Trade Commission Act of 1914, which established the Federal Trade Commission (FTC), bans "unfair methods of competition in or affecting commerce."[19] Unfair methods of competition include any conduct that would violate the Sherman Act or the Clayton Act, and other anticompetitive behavior that is not covered by other antitrust laws.[20] This grants the FTC more flexibility to bring actions against a broader range of conduct that it considers unfair.

In July of 2021, the FTC voted 3-2 to rescind its 2015 Statement of Enforcement Principles, which guided the FTC's decision on whether to challenge an act or practice as an unfair method of competition in violation of section 5 of the FTC Act.[21] The enforcement principles only covered the agency's standalone section 5 authority, which includes conduct that is not covered by the Sherman Act or Clayton Act. The recession of these principles means the Commission could issue new guidance or rules to clarify what types of practice should be prohibited under section 5.

The Robinson-Patman Act of 1936

The Robinson-Patman Act of 1936 amended the Clayton Act to ban certain discriminatory prices, services, and allowances in dealings between merchants.[22] The Robinson-Patman Act made it

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[14] *Id.*

[15] Clayton Act of 1914, 15 U.S.C. §§ 12-27 (2018).

[16] *Id.*

[17] Jay B. Sykes, CONG. RESEARCH SERV., IF 11234, ANTITRUST LAW: AN INTRODUCTION (2019).

[18] *Id.*

[19] Federal Trade Comm'n Act of 1914, 15 U.S.C. § 45(a) (2018).

[20] FED. TRADE COMM'N, A BRIEF OVERVIEW OF THE FED. TRADE COMM'NS INVESTIGATIVE, LAW ENFORCEMENT, AND RULEMAKING AUTH., https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Feb. 14, 2022).

[21] FED. TRADE COMM'N, *FTC Rescinds 2015 Policy that Ltd. Its Enforcement Ability Under the FTC Act*, (July 1, 2021) *available at* https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under.

[22] Robinson-Patman Act of 1936, 15 U.S.C. §§ 13(a)-(f) (2018).

unlawful for a seller to charge buyers different prices for commodities of "like grade and quality" when such discrimination is likely to injure competition.[23]

Injury under the Robinson-Patman Act is either "primary line" or "secondary line" injury.[24] Primary line injury occurs when a firm's competitors are harmed by its price discrimination (*i.e.*, where a firm sells a commodity at below-cost prices in certain regions to try and eliminate competitors while recouping its losses in other regions). A secondary line injury occurs when a firm's disfavored business customers are harmed by its price discrimination (*i.e.*, where a disfavored customer is placed at a competitive disadvantage relative to a price-discriminating firm's favored customers). There are legal defenses to allegations of Robinson-Patman violations. If a price difference is justified by different costs in manufacture, sale, or delivery (*e.g.*, volume discounts) for different buyers, or if the price concession was given to a firm in good faith to meet a competitor's price. The Department of Justice (DOJ) no longer enforces the Act's price-discrimination provisions, and the FTC does so very rarely.[25] However, private plaintiffs retain the ability to bring actions under Robinson-Patman.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976

In 1976 the Clayton Act was amended again by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans.[26] The Act establishes waiting periods before mergers can take place and authorizes the federal government to review additional information about the proposed merger and its potential impacts on markets and competition.

Overall, U.S. antitrust laws' ability to protect competition depends on the three factors: (1) the development and evolution of jurisprudential doctrines outlined by the courts; (2) the prosecutorial discretion and choices made by the enforcers — the Antitrust Division of the DOJ, the FTC, and state attorneys general;[27] as well as cases brought by private plaintiffs; and (3) the resources, ability, and desires of enforcement entities to engage in legal and regulatory action.[28]

Ideological Approaches to Antitrust

Because the federal antitrust statutes are broad and open to interpretation, courts have interpreted them differently throughout history. The common law nature of antitrust law has given the Supreme Court enormous influence over how the antitrust laws operate. Currently there are three schools of economic and legal theory through which antitrust can be considered.

Chicago School

The approach to antitrust developed by Chicago School lawyers revolutionized the antitrust field in the 1970s and 1980s. It is heavily based on laissez faire economic ideology and is now woven deeply into antitrust case law. The basis of Chicago School ideology is the consumer welfare

[23] Sykes, *supra* note 17.
[24] The Robinson-Patman Act of 1936, 15 U.S.C. §§ 13(a)-(f)(2018).
[25] Sykes, *supra* note 17.
[26] Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (2018).
[27] A state attorney general may bring an antitrust law under its own state laws, or it may bring a federal antitrust lawsuit on behalf of individuals in their states or on behalf of the state, also known as "parens patriae" suits. *See* *https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers*.
[28] Fiona Scott Morton, WASHINGTON CTR. FOR EQUITABLE GROWTH, MODERN U.S. ANTITRUST THEORY AND EVIDENCE AMID RISING CONCERNS OF MKT. POWER AND ITS EFFECTS (2019).

standard — the principle that antitrust law should serve consumer interests and protect competition rather than individual competitors. This tends to be a more conservative approach to antitrust enforcement that puts faith in the market and is wary of judicial intervention to correct business practices.[29]

Modern

The Modern approach recognizes that antitrust law and policy favors stronger antitrust enforcement, reflecting how the economy has evolved over time. Modernists understand that markets and business practices can differ greatly. The best way to assess the economic effects of business actions is through fact-specific inquires. The Modern approach feels that the goal of antitrust should continue to focus on protecting and promoting competition, which is fundamentally about economic effects, and should continue to be developed through the courts.[30]

New Brandies School

This theory focuses on antimonopoly as a key tool and philosophical underpinning for democratic society. This approach is deeply concerned about the power and control of large companies and how the concentration of economic power aids the concentration of political power that can undermine and overwhelm public government. In order to address these concerns, large companies need to be deconcentrating to reduce their power and open up opportunities for small businesses, provide benefits to workers, and lessen inequities. This view sees the consumer welfare standard and a narrow focus on consumer benefits of the Chicago School, which is deeply embedded in antitrust case law, as fundamentally flawed. One goal is to refocus antitrust on the competitive process and structures, rather than outcomes. Additionally, this viewpoint also sees antitrust law as just one tool in the antimonopoly toolbox. [31]

Competition Policy

As noted above, antitrust laws are essential tools to promote fair competition. However, antitrust laws alone cannot be used to ensure there is a level playing field for small businesses. In fact, antitrust enforcement is neutral to small business and focuses more on protecting consumers. Other tools to ensure fair competition are enforcement of intellectual property laws, labor laws, and consumer protection laws. Furthermore, sector regulation, where necessary, is needed to create a more level playing field. In addition, the use of forced arbitration has been used by large corporations to disadvantage small businesses.[32]

In July, the Biden Administration issued an Executive Order on "Promoting Competition in the American Economy."[33] The Order directed government agencies to examine ways to increase competition to benefit consumers, workers, farmers, and small businesses.[34] The Order also

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[29] Ianni David, *Reassessing the Chicago School of Antitrust Law*, U. CHI. (June 4, 2019) https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law.

[30] Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST, No. 3 (2021).

[31] Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate,* 9 J. EUR. COMPETITION LAW & PRAC., 3, 131–132 (2018).

[32] *See* Lauren Feiner & Annie Palmer, *Amazon Seller Blasts the Co.'s Forced Arbitration Policy in Cong. Hearing on Antitrust*, CNBC (Feb. 11, 2021, 4:12 PM), https://www.cnbc.com/2021/02/11/amazon-seller-blasts-the-companys-forced-arbitration-policy-in-congress.html.

[33] Exec. Order No. 13725, 85 Fed. Reg. 36987 (July 9, 2021).

[34] *Id.*

established a White House Competition Council, to monitor the rising power of large corporations in the economy.[35] Improving the playing field for small businesses, as this hearing will examine, will take a whole of government approach similar to what was outlined in the President's Order.

Conclusion

Small businesses play a vital role in the economy and drive a significant portion of economic growth and activity. However, their ability to compete with many large businesses has been dwindling for decades as industries have concentrated. According to some schools of economic thought on competition, antitrust enforcement and pro-competition policy can potentially mitigate or reverse these trends, resulting in lower prices, better products and services, and a more competitive American economy.

[35] *Id.*