

Statement of U.S. Senator Amy Klobuchar

**Before The U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law**

Hearing on “Treating the Problem: Addressing Anticompetitive Conduct and Consolidation in Health Care Markets”

April 29, 2021

Introduction

Good afternoon Chairman Cicilline, Ranking Member Buck, and Members of the Subcommittee on Antitrust, Commercial, and Administrative Law. As Chair of the Senate’s Competition Policy Subcommittee, I appreciate your invitation to testify today.

I would also like to thank you for focusing much-needed attention on competition in health care markets. We are all aware of the ground-breaking bipartisan work that this Subcommittee has done to explore the serious competition issues raised by dominant digital platforms, and I look forward to working with you and members of the Senate to address those issues.

America’s competition problems are not limited to just one industry. We have a market power problem that cuts across our entire economy, from pharma to online travel, from cat food to caskets. And that is certainly true for the health care markets we will be discussing today.

Rising Health Care Costs

According to the Centers for Medicare and Medicaid Services, health care spending accounted for 17.7 percent of U.S. Gross Domestic Product in 2019—that is more than one-sixth of the American economy. That figure pre-dates the COVID-19 pandemic, and it is projected to rise to 19.7 percent by 2028.

These rising costs are driven by increases in the three largest sources of healthcare spending—hospital care, physician and clinical services, and prescription drugs, which together account for more than 60 percent of healthcare spending. Unfortunately, all of these markets are highly consolidated. We continue to see large pharmaceutical mergers and serial acquisitions of smaller providers by major health systems. And we repeatedly hear complaints of anticompetitive conduct in these markets.

Every American should have access to affordable health care. But nearly 20 percent of older adults report not taking their medicines as prescribed because of the cost. This means seniors are not filling their prescriptions, or they are cutting pills in half or skipping doses, because of high

costs. And excessive consolidation is hurting consumers and contributing to the rising costs of care.

Allowing Medicare Part D to Negotiate Drug Prices

To help bring down the cost of prescription drugs, I believe we must allow Medicare to negotiate the prices of prescription drugs directly with pharmaceutical companies.

For this reason, I introduced the *Empowering Medicare Seniors to Negotiate Drug Prices Act* with Representative Peter Welch to give direct negotiation authority to the Department of Health and Human Services to address the high out-of-pocket costs too many Medicare beneficiaries are facing. With this authority, Medicare will be equipped to negotiate for the best possible price to help save money for the nearly 46 million seniors enrolled in the Part D program.

Promoting Competition through Importation

In Minnesota, we know that our friends across the border in Canada often pay much less for prescription drugs than we do. That's why we should allow people to import safe, less expensive prescription drugs from an approved Canadian pharmacy, and I've worked with Senator Grassley to introduce the *Safe and Affordable Drugs from Canada Act* which will allow just that.

More competition in the marketplace will lead to more affordable prescription drugs for Americans, and I've also worked with Senator Mike Lee to introduce the *Short on Competition Act* to help lower drug prices by giving Department of Health and Human Services the authority to prioritize approvals and safely allow temporary importation of prescription drugs to address markets that lack competition.

Protecting Drug Price Competition

Over the years, I have also worked with a number of Senators on this panel and with members of this Subcommittee to protect and foster competition in prescription drug markets. That includes our work on the *CREATES Act*, signed into law in 2019, which is helping deter pharmaceutical companies from withhold testing samples from companies that are developing alternative generic drugs and biosimilars. This Congress, I look forward to making further progress.

The availability of generic drugs and biosimilars is critical to reducing drug costs. But branded drug companies have powerful financial incentives to delay the introduction of these more affordable alternatives to their own high-priced products. Senator Grassley and I have two bills to deter pharmaceutical companies from engaging in strategies to delay the entry of competing drug products.

We have reintroduced the *Preserve Access to Affordable Generics and Biosimilars Act* in the Senate to strengthen the Federal Trade Commission's (FTC) ability to prevent anticompetitive pay-for-delay patent settlement agreements, in which branded pharmaceutical companies compensate generic drug and biosimilar manufacturers for delaying the introduction of competing products. Although it is helpful that the Supreme Court and the Fifth Circuit have acknowledged that these agreements can be anticompetitive, legislation is still necessary as

companies continue enter into these deals and enforcement requires years of litigation at great expense. Chairman Nadler and Ranking Member Buck have sponsored this legislation in the House.

We have also reintroduced the *Stop STALLING Act* in the Senate with Senator Blumenthal to help prevent anticompetitive abuse of the Food and Drug Administration (FDA) petitioning process. For too long, some pharmaceutical companies have been abusing this process by submitting sham petitions that are groundless or filed at the last minute to attempt to delay the approval of competing generic drugs. This legislation will help deter branded companies from filing unfounded petitions to delay the approval of generic drugs, preserve limited FDA resources currently wasted on reviewing baseless petitions, and bolster FTC enforcement efforts. Representative Jeffries and Ranking Member Buck have introduced this legislation in the House.

Together these bills would save the government and consumers hundreds of millions of dollars. We look forward to working with this Subcommittee to make these bills law.

Competition Policy and Health Care

In addition to targeted legislation addressing anticompetitive conduct in drug markets, Congress must update our antitrust laws to prevent the excessive consolidation and exclusionary conduct that we see across the health care sector and across our economy.

This February, I introduced the *Competition and Antitrust Law Enforcement Reform Act* with Senator Blumenthal and others. The bill would strengthen the current legal standard for reviewing mergers under the *Clayton Act* to help stop harmful consolidation, shifting the legal burden to merging parties for several categories of mergers that pose significant risks to competition. The bill also reinvigorates enforcement against anticompetitive conduct by shifting the burden to dominant firms to prove that their exclusionary conduct does not risk harming competition.

This legislation would empower enforcers to crack down on anticompetitive conduct and excessive consolidation in pharmaceutical and hospital markets. We plan to examine some of these issues in the Senate Competition Policy Subcommittee next month in a hearing on hospital competition.

In the short term, we urgently need to ensure that the enforcement agencies have the financial and human resources they need to hold some of the most powerful companies in our economy accountable when they harm competition. We cannot expect the FTC and the Antitrust Division to take on Big Pharma, Big Tech, and others when they are significantly underfunded.

Senator Grassley and I have introduced the *Merger Filing Fee Modernization Act*, which would fund a \$135 million budget increase for antitrust enforcement—split between the FTC and the Antitrust Division—by raising merger filing fees for the largest transactions. This is a proposal that I would encourage all of the members of this Subcommittee to support.

Finally, in light of the hundreds of millions of dollars in consumer redress that the FTC has recovered for consumers harmed by anticompetitive conduct in health care and related markets, I urge support for legislation to restore the FTC's authority to recover equitable monetary relief for

competition violations, as well as consumer protection violations. The Supreme Court's decision in *AMG Capital Management*¹ is nothing less than a call to action for lawmakers who are serious about protecting competition. And Congress must act swiftly.

I look forward to working with you all to address the serious competition policy problems in the health care sector and throughout our economy.

Thank you.

¹ *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, 593 U.S. ___, slip op. (Apr. 22, 2021), available at https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.