



**Competition and the Small Business Landscape:  
Fair Competition and a Level Playing Field**

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**Before the United States House of Representatives  
Committee on Small Business**

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Thank you, Chairwoman Velazquez, and Members of the House Committee on Small Business. It is an honor to be here today to lend the American Antitrust Institute's (AAI's) perspective to the issue of competition and small business. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society.<sup>1</sup> We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.

As the leading progressive organization dedicated to promoting competition, AAI commends House lawmakers for turning their attention to the question of how consolidation and market power affect American small business. As an economist and advocate for vigorous antitrust enforcement, my testimony will focus on four important topics that are relevant to the topic of today's hearing. They relate specifically to how rising concentration and the emergence of dominant firms and oligopolies in the U.S. economy affect small business.

- **Small business is an integral part of the U.S. economy. But indications that its role is declining poses challenging issues for legislators and policymakers.**
- **There is evidence that decades of weak antitrust enforcement in the U.S. has adversely affected competition. Small business may be implicated in this trend.**
- **Horizontal and vertical integration that has resulted from sweeping consolidation creates and reinforces high concentration that disrupts the role of small business.**
- **The goals of antitrust often, but not always, align with the interests of small business, highlighting the importance of broader public policy approaches to promoting competition.**

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<sup>1</sup> For more information, please see <https://www.antitrustinstitute.org>.

## **I. Small Business is an Integral Component of the American Economy**

Small business is an integral component of the U.S. economy. The Small Business Administration's (SBA's) Office of Advocacy estimates that small businesses created two-thirds of all new jobs.<sup>2</sup> They also accounted for 44% of economic activity in the U.S., as measured by gross domestic product (GDP). Small business also drives innovation and competitiveness. However, the role of small business in the U.S. economy appears to be in decline. From 1998 to 2014, for example, the small business share of GDP fell five percent from 48% to 43%.<sup>3</sup> And while the portion of real GDP accounted for by small business increased about 1.5% annually over the same period, the share accounted for by large business grew almost two times faster.

These may sound like tiny numbers, but they amount to hundreds of billions of dollars that would otherwise translate into economic benefits of innovation fostered by small business, support for economic development in smaller communities, and in injecting important competitive discipline in markets. The shift in shares of GDP accounted for by small business versus large business signals potentially troubling trends that should be considered in the context of microeconomic and macroeconomic research on concentration and market power. Lawmakers, policymakers, and antitrust enforcers might therefore ask, as the House Committee on Small Business is doing here today, why this is happening and what the contours of a responsive policy approach should look like.

## **II. There is Mounting Evidence That Decades of Weak Antitrust Enforcement Has Adversely Affected Competition**

The antitrust laws were originally passed to protect and promote competition in an era marked by the amassing and exercise of market power through harmful mergers, schemes to drive smaller rivals from the market, and anticompetitive agreements. While the vigor of antitrust enforcement in the U.S. has vacillated since the passage of the Clayton and Sherman Acts, the last 40 years have been particularly marked by relatively lax enforcement, especially in the areas of merger control under Section 7 of the Clayton Act, and monopolies under Section 2 of the Sherman Act.

This four-decade era of relatively lax antitrust enforcement was borne of conservative ideology that gave significant deference to claims that mergers and certain forms of conduct, despite having anticompetitive effects, would nonetheless increase efficiency, i.e., by lowering costs, increasing innovation, and protecting quality. "Error cost" analysis, a framework for decision-making under uncertainty, has guided conservative antitrust ideology for decades.<sup>4</sup> Under this approach, however, excess weight is given to the risk that antitrust enforcement will chill competition, and less weight is to the risk that consolidation and anticompetitive conduct will harm competition. The costs of this imbalance, of course, are borne by consumers through higher prices, lower quality, and less innovation.

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<sup>2</sup> [Small Businesses Generate 44 Percent of U.S. Economic Activity](#) (Release No. 19-1 ADV), U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY (Jan. 30, 2019).

<sup>3</sup> Kathryn Kobe and Richard Schwinn, [SMALL BUSINESS GDP 1998–2014](#), U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY (Dec. 2018), at 4-5.

<sup>4</sup> See, e.g., Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST LAW J. (Jul. 2015).

As the first progressive competition research, education, and advocacy organization, AAI was founded almost 25 years ago expressly to advocate against conservative antitrust ideology and for a progressive, pro-enforcement agenda and coherent competition policy. The fallout from this episode in American political-economic history has been, among other developments, the weakening of antitrust as a vital tool of law enforcement. The importance of competition, markets, and the democratic principles that support them are therefore at risk.<sup>5</sup> Indeed, lax antitrust enforcement has fostered a *new* generation of powerful dominant firms and domestic oligopolies in critical sectors such as healthcare, food and agriculture, media, telecommunications, and digital technology.

The exercise of market power by dominant firms and oligopolies distorts the competitive process and harms virtually all types of market participants. Consumers pay higher prices, and face lower quality products, less innovation, and a loss of choice. Producers are squeezed through lower prices paid for their products and services. And smaller businesses are harmed through higher costs and barriers to market entry, and the threat of retaliation.<sup>6</sup> These concerns should be considered in the context of economic evidence on rising concentration and declining competition.

For example, experts have identified increasing levels of concentration at the sector and industry levels. Sources include the Council of Economic Advisors (CEA), The Economist magazine, and Wall Street Journal.<sup>7</sup> These trends highlight the imperative of studying concentration at the market level and the “relevant” market level, i.e., markets that are defined in antitrust cases. They also spotlight the possible role of increasing concentration in driving up prices to consumers. For example, a leading meta-analysis of 50 studies encompassing more than 3,000 mergers over the last 25 years indicates that post-merger prices increased, on average, by 7.2%.<sup>8</sup> This body of research also raises serious questions about the role of increasing concentration in raising barriers to market entry as a possible reason for why the rate of firm entry in the U.S. is in a 40-year free fall.<sup>9</sup>

Moreover, there is concern that income and wealth inequality are major problems in the U.S.<sup>10</sup> The CEA cites recent research indicating that returns on investments in capital for the most profitable 10% of firms are five times the median.<sup>11</sup> Another study shows that the “prime driver of wage inequality is the growing gap between the most- and least-profitable companies.”<sup>12</sup> As

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<sup>5</sup> [THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.](#), AMERICAN ANTITRUST INST. (Apr. 14, 2020), at 3-4.

<sup>6</sup> See, e.g., Comments of the American Antitrust Institute in [re: Supply Chains for the Production of Agricultural Commodities and Food Products](#), Docket No. AMS-TM-21-0034, AMERICAN ANTITRUST INST. (Jun. 21, 2021), at 3.

<sup>7</sup> Council of Economic Advisers (CEA), [Benefits of Competition and Indicators of Market Power](#), The White House (Apr. 2016), at 4; [Too Much of a Good Thing](#), ECONOMIST, (Mar. 26, 2016); and Theo Francis & Ryan Knutson, [Wave of Megadeals Tests Antitrust Limits in U.S.](#), WALL STREET J. (Oct. 18, 2015) (citing Gerard Hoberg and Gordon Phillips).

<sup>8</sup> See e.g., John E. Kwoka, Jr., [MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY](#) (2014).

<sup>9</sup> See, e.g., Jonathan D. Ostry, Andrew Berg & Charalambos G. Tsangarides, [Redistribution, Inequality, and Growth](#), INTERNATIONAL MONETARY FUND (Feb. 2014); Bruce A. Blonigen and Justin R. Pierce, [Evidence for the Effects of Mergers on Market Power and Efficiency](#), Fed. Reserve Bd. Working Paper No. 2016-082 (2016), at 24; and José Azar et al., [Labor Market Concentration](#), NBER Working Paper No. 24147 (Dec. 2017).

<sup>10</sup> CEA, *supra* note 7, at 5.

<sup>11</sup> *Id.* See also Jason Furman and Peter Orszag, [A Firm-Level Perspective on the Role of Rents in the Rise in Inequality](#); Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz, Columbia University (Oct. 16, 2015).

<sup>12</sup> Greg Ip, [Behind Rising Inequality: More Unequal Companies](#), WALL STREET J. (Nov. 4, 2015).

“wage setters,” the most profitable firms drive wages down, shifting wealth from labor to capital.<sup>13</sup> There is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects. Leading law and economics experts offer that the “adoption of more permissive antitrust rules during the past quarter century” likely increased the prevalence of market power, with the returns from it flowing disproportionately to the wealthy.<sup>14</sup>

### III. Horizontal and Vertical Integration Can Create or Reinforce High Concentration That Disrupts the Role of Small Business

The dominant firms and oligopolies that can result from sweeping consolidation have a number of implications for small business. To better understand these dynamics, it is important to review key drivers of weaker enforcement over the last forty years. For example, horizontal mergers eliminate a competitor, resulting in a firm with a higher market share, and increased market concentration. Some horizontal mergers increase the risk that merged firm will act unilaterally (i.e., alone) to exercise market power, or coordinate with rivals in the market to raise prices, lower quality, or slow innovation. Over the last several decades, weaker horizontal merger enforcement has been revealed, for example, in the failure to enforce the “structural presumption,” or the rebuttable presumption that a highly concentrative merger is presumptively illegal.<sup>15</sup>

In contrast, vertical mergers combine firms that operate at different levels in a supply chain, such as manufacturing and distribution, or upstream inputs and downstream outputs. While they do not increase market concentration, vertical mergers can enhance the ability and/or incentive for the merged firm to engage in conduct that restricts competition in one or more adjacent markets. Like the structural presumption in the case of horizontal mergers, vertical merger enforcement has also been weakened over time. This is most obvious in the deference that courts have given to efficiencies that are typically claimed in vertical mergers. These include costs savings associated with alleged elimination of double margins and claimed benefits of enhanced coordination on innovation.<sup>16</sup>

Integration can result in any number of challenges for smaller firms, especially when it enhances a dominant firm’s ability or incentives to cut off smaller rivals’ access to inputs or distribution, or to engage in predatory behavior. For example, a major concern in the merger of AB InBev and SAB Miller was enhanced incentives to exclude competitors from access to distribution.<sup>17</sup> Smaller beer producers, such as craft brewers, were particularly exposed to this risk. Another example is vertical integration into cattle supply by the oligopoly of beef packers in the U.S.. Such integration enhances incentives to force out smaller, independent ranchers and microprocessors. The court’s opinion in the litigated merger of AT&T and Time Warner noted the adverse effect of combining content and distribution on frustrating innovation from smaller firms.<sup>18</sup> And in the FTC’s monopolization case against Facebook, the government’s complaint focused on conduct that eliminated competitive

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<sup>13</sup> Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (Mar. 2016).

<sup>14</sup> See Jonathan Baker and Steve Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015).

<sup>15</sup> United States v. Phila. Nat’l Bank, 374 U.S. 321, 363 (1963). Herbert J. Hovenkamp and Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE LAW J. (May 2018), at 1997.

<sup>16</sup> Letter to the U.S. Dept. of Justice, Re: [Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers](#), AMERICAN ANTITRUST INST. AND PUBLIC KNOWLEDGE (Sept. 21, 2021).

<sup>17</sup> U.S. v. Anheuser-Busch InBev SA/NV and SABMiller, No. 1:16-cv-01483 (D.D.C., filed Jul. 20, 2016), at 12.

<sup>18</sup> U.S. v. AT&T Inc. et al., Memorandum Opinion, No. 17-2511 (D.D.C., filed Jun. 12, 2018), at 18-20.

threats in the market for personal social networks to maintain a dominant position. This included Facebook’s acquisition of smaller rivals or limiting their ability to compete on its platform.<sup>19</sup>

#### **IV. A Public Policy Approach to Promoting Competition is Vital, and Finding Complementarities Between Antitrust and Other Policy Tools is the Most Likely to Promote the Role of Small Business**

Concerns over declining competition and rising concentration have risen to the level of a public policy problem in the U.S. As such, responses to it should make use of all of the tools in the “competition policy” toolkit. This includes antitrust enforcement, but also law and policy around labor, intellectual property, consumer protection, procurement, small business, and others. Strong public policy approaches make the best use of tools based on their comparative advantages, and are ideally designed to work in a complementary way. This toolkit approach is critically important for designing policies that are responsive to the effects of consolidation and concentration on small business. This is because antitrust enforcement can be the most powerful tool in promoting the role of small business. But antitrust enforcement may also work in ways that run counter to the policies and goals of small business.

Antitrust has a powerful competitive advantage in several major areas where small business can be adversely affected. As explained above, perhaps the most important is aggressively pursuing enforcement of mergers and strategic conduct by dominant firms and oligopolies with incentives to exclude or neutralize threats from smaller disruptive and innovative rivals.<sup>20</sup> Exclusionary conduct includes any number of strategies to foreclose rivals, raise their costs, or to erect entry barriers to markets. This includes denying access to inputs and distribution, predatory pricing or bidding, and frustrating interoperability—strategies that have an outsized effect on smaller competitors.

A second area in which antitrust enforcement plays a vital role in regard to smaller businesses is in a dominant firm’s use of intellectual property to shape or control competition, deceptive practices designed to maintain a market position, and sham litigation to limit competition. Examples include *Retractable Technologies Inc. v. Becton Dickenson* (retractable syringes), which highlighted deceptive practices by a dominant firm to exclude a smaller, disruptive rival.<sup>21</sup> Another is *In re Suboxone Antitrust Litigation*, where patients were coerced into using a patented film formulation of opioid addiction treatment instead of a tablet form. However, tablet formulations were on the brink of becoming open to generic competition and entry by smaller pharmaceutical firms.<sup>22</sup>

But there are also areas where antitrust enforcement may not align as well with a goal of promoting the role of small business. Generally, antitrust enforcement places no special or intrinsic value on the role of small business in the economy. Indeed, antitrust is concerned with the effects of anticompetitive consolidation and conduct on “competition,” not individual “competitors.” Specific areas where antitrust enforcement may result in outcomes that are not particularly in the interests of

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<sup>19</sup> See *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020). See also, *New York v. Facebook*, No. 1:2020-CV-03589 (D.D.C. filed Dec. 9, 2020).

<sup>20</sup> See, e.g., Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313 (2012).

<sup>21</sup> See, e.g., Brad Perriello, [Appeals court upholds BD win in Retractable Technologies case, MassDevice.com](#), MASSDEVICE.COM (Mar. 28, 2019).

<sup>22</sup> [AAI Urges Third Circuit to Preserve Product Hopping Case on Behalf of Victims of the Opioid Epidemic \(In re Suboxone Antitrust Litigation\)](#), AMERICAN ANTITRUST INST. (Mar. 12, 2020).

small business include more aggressive antitrust reviews of acquisitions of smaller rivals that pose an innovative threat to a large incumbent firm. Such acquisitions have particularly harmful effects on consumers by reducing innovation.<sup>23</sup> Examples of acquisitions of smaller rivals that were met with a government resistance include Visa-Plaid and John Deere-Precision Planting.<sup>24</sup> However, the goals of smaller businesses that are sustained by the venture-capital backed startup model is to be acquired by a larger company *and* maximize the acquisition price. This exit strategy model contrasts with one of continuing to innovate as a standalone rival and to eventually challenge the market position of a large incumbent.

Another example is the non-compete clause, which prevents workers from entering into or starting a similar profession or trade in competition against another party. Such clauses are often used by small businesses as a way to protect trade secrets, but they are increasingly under scrutiny by antitrust enforcers for their anticompetitive effects and role in restricting worker mobility. This is particularly true in markets, such as hospitals and physician practices, that are dominated by only a few players and where a non-compete clause can eliminate employment options in a geographic area.

Finally, some types of antitrust remedies can put small businesses into the crosshairs of dominant firms and oligopolies. For example, conduct remedies are often used by antitrust enforcers to settle antitrust violations. Such remedies spell out required conduct and proscribed conduct by a firm. This is particularly true in the case of vertical mergers, including cases like Live Nation-Ticketmaster where concerns over the exclusion of rivals were addressed through nondiscrimination requirements. But most of those requirements are enforceable only if the very same firms that are the target of anticompetitive behavior come forward to enforcers to complain. These often-smaller rivals, especially those that depend on larger firms as suppliers or customers, often fear retaliation from dominant firms.<sup>25</sup> Anti-retaliation provisions in antitrust consent decrees may not be effective in limiting retaliatory conduct.

## V. Conclusions

In sum, there are growing concerns around troubling increases in concentration and declining competition in the U.S. Superimposed on these are further concerns over a potentially declining role of small business in the U.S. economy. As an integral driver of employment and economic growth, small business should be a policy focus. However, policies designed to promote the role of small business will have to reconcile a number of forces. The emergence of dominant firms and oligopolies from decades of weak antitrust enforcement pose numerous concerns, including various forms of exclusionary conduct and higher barriers to entry. There is much that more aggressive antitrust enforcement can do to promote and protect the role of small business. At the same time, antitrust may not always align with the goals of promoting small business. For these reasons, legislators and policymakers should carefully consider how antitrust fits within a broader policy framework for promoting small business and how different policy tools can work in complementary ways.

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<sup>23</sup> See, e.g., Tim Wu and C. Scott Hemphill, [Nascent Competitors](#), 168 PENN. L. REVIEW 1879 (2020); and Carl Shapiro, [Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets](#), 33 J. ECON. PERSPECTIVES 69 (Summer 2019), at 30.

<sup>24</sup> U.S. v. Visa Inc. and Plaid Inc., Complaint, No. 3:20-cv-07810 (D.D.C., filed Nov. 5, 2020) and U.S. v. Deere and Co. and Precision Planting LLC, Complaint, No. 1:16-cv-08515 (N.D. Ill., filed Aug. 31, 2016).

<sup>25</sup> See [Competition Roundtable: The Darkest Side of Rising Concentration — Fear and Retaliation in Antitrust](#), AMERICAN ANTITRUST INST. (Oct. 20, 2021).