Chairman David N. Cicilline
House Antitrust Subcommittee
Keynote Remarks, As Delivered
June 20, 2019

Good afternoon. I'm glad to be here today for AAI's 20th Annual Policy Conference on Strengthening Antitrust Enforcement. I want to thank Diana Moss, Randy Stutz, and the entire team at the American Antitrust Institute for inviting me to speak at today's event.

From its humble beginnings under the founding and leadership of Bert Foer in 1998, AAI has served the public as a pioneer in competition advocacy dedicated to protecting consumers, businesses, and society.

This important work continues under the leadership of Diana and Pam Gilbert, the Chair of AAI's Board of Directors, and is more important today than ever before.

As a member of the House Judiciary Committee, I am reminded on a daily basis of the importance of the institutional structure the Constitution establishes for our government— three separate branches of government— and the vital role each branch must play to ensure the survival and success of our democracy and the rule of law.

For our system of free enterprise to thrive, each branch of government must also do its job.

As the legislative branch, Congress is constitutionally responsible for enacting the will of the people by establishing laws, creating agencies to help enact those laws, and conducting both government and corporate oversight. Of course, in antitrust matters Congress has passed a series of laws establishing a presumption in favor of competition and against monopoly.

The Executive Branch, through the Department of Justice's Antitrust Division and the Federal Trade Commission, is charged with enforcing the law that Congress created.

And the Courts are charged with interpreting and applying these laws.

For the better part of a century, Congress actively shaped our competition system.

Congress enacted the Sherman Antitrust Act of 1890 to serve as a "bill of rights" and a "charter of liberty."

In 1914, Congress enacted the Clayton Act and Federal Trade Commission Act. Congress passed these laws following Supreme Court decisions that had weakened the Sherman Act and assumed outsized judicial authority to shape what the law is. The Clayton and FTC Acts echoed the Sherman Act's distrust of concentrated private power and gave both public and private enforcers greater ability to halt corporate concentration and anti-competitive conduct in their incipiency.

And again in 1950, Congress enacted the Celler-Kefauver Antimerger Act to reverse the rising tide of economic concentration in the American economy. Passed in the wake of World War II, the Antimerger Act reflected a fear among lawmakers that outsized private power would pave the path to fascism.

Under the leadership of Chairmen Emanuel Celler, the House Judiciary Subcommittee on the Study of Monopoly Power conducted investigations into anti-competitive conduct by dominant firms, examined enforcement trends, and explored policies to promote competition in markets that were highly concentrated.

Over the past several decades, however, Congress has retreated from this active role, allowing the laws to become more technical, less effective, and altogether less democratic in the hands of the courts. As Professors Harry First and Spencer Weber Waller noted in their article Antitrust's Democracy Deficit, the courts have placed antitrust on "a thin diet of efficiency, one that has weakened [its] ability to control corporate power."

During this same period, consolidation throughout the economy has wiped out competition and hollowed out the middle class, resulting in less choice, higher prices, worse quality, and record levels of inequality.

The Open Markets Institute recently released a report on America's current competition crisis, showing high levels of concentration across myriad industries.

For example, most patients with kidney failure have at most two companies to choose from for dialysis because Fresenius and DaVita own over 90% of U.S. dialysis centers.

In the technology sector, Google controls 90% of the market for search engines and Facebook accounts for over 70% of social networking sites.

Other studies show that a reduction in competition among firms—and the associated reduction of workers' bargaining power—has put downward pressure on wages for employees. When combined with declining unionization levels, this trend has had devastating consequences for working people.

As Nobel prize winning economist Joseph Stiglitz has warned, "We have become a rent-seeking society, dominated by market power of large corporations, unchecked by countervailing powers. And the power of workers has been weakened, if not eviscerated."

They may not use the words "unilateral effects" or "monopsony," but Americans across the political spectrum know that our economy makes it increasingly impossible for working people to achieve a life that is secure and dignified.

Addressing these problems head-on is my top priority as Chairman of the House Antitrust Subcommittee. In particular, I have prioritized tackling consolidation and anti-competitive practices in three critical areas: our health care system, labor markets, and online.

The lack of competition in healthcare markets is a leading cause of skyrocketing costs, diminished choice, and worse quality.

The cost of prescription medicine has increased by 200% over the past decade. Americans spend roughly $1,200 on average on prescription drugs every year—which is more than people in any other developed country.

Kaiser Health reports that a quarter of Americans cannot afford their medicine while many cancer patients are delaying care, cutting their pills in half, or skipping drug treatment entirely.

Despite decades of rising costs, recent reports show the United States ranks dead last in health outcomes among similar countries.

And in hospital and health insurance markets, consolidation threatens the quality and affordability of care. At a recent hearing held by the Subcommittee, Dr. Marty Gaynor of Carnegie Mellon University noted that strong economic evidence shows that hospitals and doctors who face less competition charge significantly higher prices without accompanying gains in quality.

While the antitrust agencies have brought some successful cases challenging anti-competitive mergers and conduct in the healthcare sector, even when courts get it right, litigation is extremely expensive and time-consuming. Too often, victory in the courthouse does not actually deliver effective relief or timely deterrence.

That is why Congress must step up.

In April, the Committee unanimously voted in favor of a package of bills to lower drug costs. These bills target anti-competitive delay tactics, such as pay-for-delay agreements, abuse of regulatory safeguards known as risk evaluation mitigation strategies requirements—also known as REMS abuse—and exploitation of the FDA's citizen petition process to delay generic entry. Each of these tactics has the effect of delaying low-cost generics from entering the market, greatly contributing to higher drug costs.

As many of you know, pay-for-delay agreements take place when one drug company literally pays a competitor to keep a generic version of its drug off the market under the guise of a patent settlement agreement. The Federal Trade Commission's landmark Supreme Court victory in Actavis sent a clear signal that pay-for-delay agreements are often anti-competitive, but this egregious behavior is still taking place today.

Despite recent reports that pay-for-delay agreements are on the decline, a study by Professor Robin Feldman of the University of California Hastings found that the number of pay-for-delay agreements may have actually increased in the wake of Actavis as companies found creative ways to hide value and mask anti-competitive maneuvers in settlement agreements.

REMS abuse is another example of an anti-competitive delay tactic. It occurs when brand-name drug manufacturers unreasonably deny generics access to a certain category of drug samples. Generics require access to these samples in order to complete testing and obtain FDA approval. The non-partisan Congressional Budget Office estimates that addressing REMS abuse will save taxpayers about $4 billion over ten years.

And finally, citizen petition abuse is yet another anti-competitive tactic used by branded drug companies to block generic competition. Congress designed the citizen petition process to empower everyday Americans to raise legitimate health and safety concerns.

But branded drug companies hijacked the process to stall entry by competitors. Professor Robin Feldman recently estimated that citizen petition abuse cost society almost $2 billion over a period of just two years.

The House has already passed legislation, the CREATES Act, to address REMS abuse, and we expect activity on the remaining bills in the coming months.

While I am proud of the progress we have made to address these anti-competitive tactics, it is vital that we continue our work to diagnose and solve competition problems in healthcare markets.

Labor markets are also characterized today by an extreme degree of concentration and lack of competition.

The decline of competition in labor markets has been an economic catastrophe for millions of workers. Employers that are free of competitive pressure have the power to dictate wages and are able to squeeze workers through worse salaries, benefits, and degraded workplace conditions.

Employers with monopsony power can also impose on workers forced arbitration and non-compete clauses—draconian requirements that deprive workers of critical legal protections and leave them more trapped and less free.

It is well documented that labor has experienced a declining share of profits in the U.S. economy. Over the past 15 years, while corporate profits soared, the decline in labor's share of national income has accelerated rapidly.

And while the effects of economic concentration have been devastating for nearly all workers—it most severely harms workers in vulnerable groups such as women and minorities who have

less bargaining power against wage discrimination and other forms of workplace harassment and inequality.

There are widespread reports that a lack of competition among employers in labor markets is a significant contributing factor to wage depression.

Professors Jose Azar, Ioana Marinescu, and Marshall Steinbaum have documented that workers' wages are lower in markets where employers enjoy monopsony power.

Meanwhile, a recent study by Elena Prager of Northwestern University and Matt Schmitt of UCLA found that hospital mergers resulted in increased labor market power and suppressed wages for nurses and pharmacy workers.

Rising economic concentration has also enabled anti-competitive conduct in labor markets—such as agreements among employers to fix wages or not to hire a competitor's employers—that create barriers to employment, mobility, and opportunity for working Americans.

There is mounting evidence of the widespread use of non-compete clauses in everyday employment contracts. For example, the Treasury Department reported that nearly 30 million working Americans at all levels of employment are covered by non-compete clauses.

According to this report, these non-competes prevent workers from finding new employment even after being fired without cause.

Less than a quarter of workers report that their jobs involve trade secrets. And less than half of non-compete agreements involve work subject to trade secrets. To the contrary, only a small fraction of college-educated employees are subject to trade secrets.

In fact, many workers have already accepted a job before they even see the text of an employment contract or are simply unaware that they have agreed not to work for a competing business.

There is also no shortage of examples of employers colluding at the expense of workers through no-poach agreements—a criminal violation of the antitrust laws.

These clauses also drive down wages and prevent workers from moving to better job opportunities or finding relief from a hostile work environment.

In response to this problem, I plan to re-introduce legislation with House Judiciary Chairman Nadler to end the scourge of no-poach and non-compete clauses.

Ensuring that American workers enjoy the full benefits of competition in the workplace is fundamental to a healthy and fair economy. This will continue to be a top priority for me and the Antitrust Subcommittee.

The third part of my competition agenda targets the lack of competition in the online marketplace.

In recent years, there has been a cascade of competition problems on the Internet. A small number of dominant, unregulated platforms have extraordinary power over commerce, communication, and information online.

Since 2007, Google has acquired several of its competitors in digital advertising, resulting in significant concentration and a complete lack of transparency in this market.

And since 2011, another dominant online platform, Facebook, has acquired two of its most significant rivals—Instagram and WhatsApp—in an effort to corner the market for social media services and advertising on these services.

A recent analysis by Professor Tim Wu determined that Google has made 270 acquisitions and Facebook has made 92. Federal enforcers did not block a single one of these 350-plus acquisitions.

The sheer dominance of some of these platforms has resulted in worse products and significantly less choice, leaving people without a competitive alternative to services that are increasingly essential to navigating 21st century life. As these firms have squashed the competition, they have imposed new terms of services that further exploit user data and leave everyday people powerless to escape the platforms' elaborate surveillance machines.

There have been numerous reports of digital platforms engaging in potentially anti-competitive conduct—such as favoring their own products or discriminating against rivals—that has gone unchallenged by antitrust enforcers in the United States.

That's why earlier this month, the Antitrust Subcommittee announced that we will conduct a bipartisan investigation into competition in the online marketplace.

The purpose of this investigation is to document whether dominant market participants are exercising their market power in anti-competitive ways, and to and assess whether our existing laws and current enforcement levels are adequate to address these problems.

Over the coming months, we will conduct a top-to-bottom review of online markets through a series of hearings, information requests, and a series of discussions with key stakeholders and policy experts.

This is the first significant antitrust investigation undertaken by Congress in decades. In the past, these investigations—which included studies of monopoly power in the airline industry, banking, oil, and Ma Bell—led Congress to identify what it needed to do to safeguard Americans from monopolistic abuses.

Today, we are in a similar moment.

No doubt, other branches of government have a key role to play in the development of antitrust law. But Congress—not the courts, agencies, or private companies—enacted the antitrust laws, and Congress ultimately decides what the law should be and whether the law is working for the American people.

As such, it is Congress' responsibility to conduct oversight of our antitrust laws and competition system to ensure that they are properly working and to enact changes when they are not.

While I do not have any preconceived ideas about what the right answer is, as Chairman of the Antitrust Subcommittee, I intend to carry out that responsibility with the sense of urgency and serious deliberation that it demands.

I look forward to working with my colleagues, and with experts in antitrust and technology markets, to make sure we have the best information possible as we conduct this important work.

Thank you.