AMERICAN ECONOMIC LIBERTIES PROJECT

Antimonopoly Policy Agenda for the 118th Congress

March 2023
American Economic Liberties Project

Today, millions of American families are struggling while corporate monopolies and Wall Street are doing better than ever. In 2022, corporate profits reached a 70-year high. In 2021, private equity buyouts hit a new high of $1.1 trillion and big corporations bought back a record $900 billion of their own stock (roughly $3,000 for every person in the U.S.), while $5 trillion in global mergers and acquisitions deals also crushed records.

This problem is not new. Over the past two decades, 75% of U.S. industries have become more concentrated. Monopolization is happening in national markets like search engines, online commerce, airlines, seeds and chemicals, and social networks. It's happening in small markets with hospitals, prison phone services, syringes, portable toilets, funeral caskets, and mixed martial arts. At the same time, decades of corporate-friendly trade policy have encouraged the offshoring of American jobs, weakened American supply chains, and endangered our national security in the process.

This is why it's now twice as hard to start a business than it was in 1980. It's why Americans' take-home pay is up to 30% lower than it should be. And this is a big reason why our healthcare system hurts patients and healthcare workers, our family farms are going extinct, our ability to share information online is distorted and divisive, and our entrepreneurs and small businesses can't access the capital they need — and it's why we are experiencing shortages in important products, like lifesaving medicine and food.

In recent years, advocates in government and across the country have reinvigorated the American antimonopoly tradition to push back against this monopolized economy and corporate-rigged globalization. However, while the problem may be simple — we have concentrated too much economic and political power in the hands of private corporations — the needed policy solutions are many. They touch on many areas: not just antitrust, but also financial regulation, agricultural policy, trade policy, intellectual property, labor rights, healthcare procurement, consumer protection, judicial precedent, and industrial policies, among others.

Here we outline a concrete policy agenda for antimonopoly advocates in Congress to shift our country to a fairer economy. These include existing but much-needed pieces of legislation, ideas for legislation that should be introduced, investigations of key sectors or companies, and congressional oversight to pressure key parts of the executive branch to take action. We have organized this policy agenda into three sections: (1) sector-by-sector policy proposals, (2) cross-cutting policies, like antitrust, that touch the entire economy, and (3) recommendations for congressional investigations.

I. SECTORAL POLICIES

AGRICULTURE

Stop Further Consolidation in Big Ag. While many recent mergers and acquisitions among seed and fertilizer companies should be unwound, Congress should impose an immediate moratorium on further consolidation among big agribusinesses.

> *Existing Bill:* The Food and Agribusiness Merger Moratorium and Antitrust Review Act issues a moratorium on merger activity in large agriculture and food retail businesses and establishes the Food and Agriculture Concentration and Market Power Review Commission to report on the consequences of market concentration in agriculture.

Establish Right to Repair. Monopolies in agribusiness, electronics, and other industries have forbidden farmers and consumers from repairing or adjusting their own equipment without going through the manufacturer, who is then able to overcharge for the repair. Congress should enact a national right-to-repair law that guarantees farmers and consumers the ability to repair their own equipment.

> *Existing Bills:* The Agricultural Right to Repair Act establishes the right to repair for farm equipment. The Fair Repair Act establishes the right to repair generally. The Freedom to Repair Act eliminates a technicality in copyright law that manufacturers have exploited to lock repair functions.

Protect Small Farmers from Big Agribusiness Lobbying. Producers of milk, wheat, beef, potatoes, pecans, and many other commodities are legally required to pay fees to the U.S. government, intended for research and promotion of their products, which are directed to trade groups who are dominated by the biggest industry players. The funding is routinely used to lobby for policies that benefit the largest agribusinesses and further disadvantage smaller farmers. Congress

should prohibit these "checkoff funds" from being used for lobbying, rein in conflicts of interest, and otherwise reform the federal checkoff program. Congress could also push the USDA to revise its Guidelines for Commodity Research and Promotion Programs.

Existing Bill: Opportunities for Fairness in Farming Act and Voluntary Checkoff Act.

Enforce Competition in Meatpacking. Until it was reorganized with less authority by the Trump administration, the Grain Inspection, Packers and Stockyards Administration (GIPSA) was an independent agency charged with enforcing competition policy in the meatpacking industry, including by enforcing the Packers and Stockyards Act, which prohibits unfair or deceptive practices, manipulating prices, or creating a monopoly, among other things.

- Reinstate GIPSA: Congress should push the USDA to reinstate an independent GIPSA and enact rules prohibiting packers from using short-term contracts they can terminate at will, outlaw retaliation against growers for airing grievances or cooperating with other producers, grant producers an effective right to decline arbitration of legal disputes, and create clear criteria for unfair and discriminatory practices in each livestock sector.
- Strengthen Packers and Stockyards: Congress should update the Packers and Stockyards Act to ban meatpackers from owning livestock, abolish abusive payment systems, and grant farmers greater legal standing to sue meatpackers.

Protect American Ranchers from Deceptive Imports. Big meatpackers will often misleadingly label their beef as a "Product of the USA" when in fact the cattle were raised and possibly slaughtered abroad, but merely finished in the United States. This is deceptive and unfairly disadvantages American ranchers. Congress should act to ensure that beef is labeled to accurately reflect its true origins.

Existing Bill: The American Beef Labeling Act requires the United States Trade Representative (USTR) and the Department of Agriculture to reinstate mandatory country of origin labeling (MCOOL) for beef.

Ban Foreign Investors from Buying Farmland. As of 2019, foreign investors already owned around 35.2 million acres of U.S. farmland, an amount of land about the size of Iowa. Given the adversarial interests of some of this foreign investment, and that ownership of U.S. farmland is already overly concentrated, Congress should prohibit foreign farmland acquisitions.

BIG TECH

Save Journalism from Big Tech. Google and Facebook (Meta) maintain a duopoly over online advertising markets and, to a lesser extent, online web traffic. Digital publishers, including

newspapers, derive most of their revenue and much of their readership from these sources. As a result, Google and Facebook profit from journalism without sufficiently paying for it, which prevents journalism outlets from remaining viable businesses.

Existing Bill: The Journalism Competition and Preservation Act (JCPA) allows publishers to collectively bargain with the tech platforms over compensation. It is an improved version of the successful News Media Bargaining Code in Australia, which has led to a boom in journalism there.

Reform Big Tech App Stores. Apple and Google maintain the two primary app stores for mobile devices, where users download everything from Candy Crush to Spotify. These app stores require developers and users to use proprietary payment processors, through which they charge exorbitant markups. They also coerce other companies to prevent apps from being downloaded through means other than their own app store. Google and Apple have both faced antitrust suits for this behavior, but this anticompetitive and restrictive behavior should be prohibited.

Existing Bill: Open App Markets Act

Ban Surveillance Advertising. Many tech platforms rely on "surveillance advertising," in which they vacuum up reams of personal information about all web users, then process that information through sophisticated algorithms to target individual users with ads. This is both a violation of user privacy and an unfair method of competition, as smaller competitors have neither the digital infrastructure to conduct such data processing nor the multiple business lines through which such targeting can be deployed.

Existing Bill: Banning Surveillance Advertising Act

Keep Big Tech Out of Finance. Big Tech firms are entering into financial services and the traditional banking sector, from Facebook's attempt to begin its own currency to Google's and Apple's move into payment systems and other "fintech." This expands Big Tech's digital surveillance powers, since they can see users' consumer choices and creditworthiness, and expands their power over the economy generally.

Existing Bill: Appropriately named, the Keep Big Tech Out of Finance Act does just that.

Stop Big Tech from Preferencing Their Own Products. Big Tech platforms like Google and Amazon often use their dominant platform positions to favor their own products over options from competitors, who might provide better products or services. For example, Amazon will rig search results on their site to favor Amazon Basics branded products, while Google will favor Google Maps or YouTube in search results. Congress should prohibit dominant tech platforms from self-preferencing so that Big Tech must compete to prove their services are better than their competitors'.

Existing Bill: The American Innovation and Choice Online Act prohibits the largest tech platforms from self-preferencing their own products.

Stop Big Tech from Hijacking Trade Agreements. Big Tech is trying to block reasonable domestic regulations, like those proposed above, by arguing in bad faith that these regulations are illegal trade barriers. In opposition to common digital governance measures — which are essential to create fair markets, protect privacy and data security, and counter online civil rights and labor law violations — tech interests are pushing this agenda in IPEF and other "trade" negotiations as well as domestic legislation. If successful, such trade agreements would handcuff democratically elected governments, here and abroad, from regulating Big Tech. Congress must assert its constitutional authority to "regulate commerce with foreign nations" by ensuring that Congress approves of any trade agreement. Congress should replace the Nixon-era "Fast Track/Trade Promotion Authority," which delegated Congress' constitutional trade authority to the executive branch.

Protect Personal Data from Abuse. One of the main sources of Big Tech's power is its ability to gather, retain, process, and deploy vast amounts of personal data from users, consumers, and competing businesses. Many of these practices are violations of our most basic norms of personal privacy and autonomy, but tech platforms combine data from many sources, like consumer purchases, healthcare behavior, credit ratings, and social media posts, to exploit them for the greatest profit.

> *Existing Bill:* The American Data Privacy and Protection Act requires companies and organizations to minimize the amount of personal data they store and establishes greater user control over how data can be used.

HEALTHCARE

End Medical Shortages. For decades, medical providers in the United States have faced near-constant shortages in critical medical supplies, including everything from saline solution to blood pressure medication. In June 2021, the Biden administration released a Supply Chain Review Report that identified the threats posed by the manufacturing of medicines and precursor inputs being highly concentrated in very few countries, especially China and India. There are several essential legislative remedies:

- End kickback exemptions for medical supply middlemen: Group purchasing organizations (GPOs) are for-profit companies that arrange the medical supply contracts for U.S. hospitals and other providers, often locking providers into sole-sourced contracts with unreliable foreign manufacturers. GPOs are paid by their suppliers, introducing a series of perverse incentives to favor inflexible long-term contracts that lock out domestic or more innovative suppliers. This revenue structure relies on an exemption from federal anti-kickback rules. This exemption has been continuously extended, most recently tacked onto last year's gun control legislation. It should be eliminated.

- Add procurement requirements for U.S. sourcing of key medicines: The Biden administration's supply chain report proposed phasing in new requirements for U.S. sourcing of target medicines procured directly by the U.S. government, for instance, for the military Tricare program, or where the provider is reimbursed through Medicare and Medicaid.
- Authorize government production of critical medicines: To facilitate domestic production, Congress could authorize government production of key medicines and active pharmaceutical ingredients, and/or authorize government-owned/company-operated (GOCO) production facilities for critical medicines. This could be modeled on U.S. nuclear weapons production facilities, where today 16 of the 17 U.S. Department of Energy laboratories are GOCOs.

Bring Down Drug Prices. There are many drivers of high drug prices, but there are several immediate actions that can address the problem:

- Ban pay-for-delay agreements: Branded drug manufacturers charge inflated prices for medications, sometimes based on bogus patents. When generic manufacturers challenge these patents by entering the market anyway, branded manufacturers will sometimes make a "reverse settlement agreement" (pay-for-delay), in which they pay the generic manufacturer to delay their entry into the market. These agreements essentially buy off the competition by sharing the brand manufacturer's monopoly profits. The cost of pay-for-delay agreements to the U.S. public and patients has been estimated to be between $6 billion and $36 billion per year. The Supreme Court has ruled that these agreements are sometimes illegal, but they should be outright prohibited.
- Remove anti-kickback exemptions for pharmaceutical middlemen: Pharmacy benefit managers (PBMs) choose which drugs are covered by your health insurance and take kickbacks from drug manufacturers, incentivizing them to select more expensive versions of drugs such as insulin. This arrangement relies on an exemption from federal anti-kickback rules. This exemption should be eliminated, so PBMs will instead have incentives to choose the cheapest drugs.

Control Pricing Power of Concentrated Hospital Systems. Large hospital systems frequently buy smaller hospitals and then raise prices to increase their profits. Hospital mergers and concentrated hospital systems lead to worse patient outcomes, higher mortality, and higher prices for patients.

Existing Bill: The Hospital Competition Act requires that monopolistic hospitals charge the same prices paid by Medicare and would reduce the cost of healthcare for the median family by one-third in the first year.

Give FTC Jurisdiction over Nonprofit Hospitals. Currently, the Federal Trade Commission is the main federal antitrust regulator responsible for the healthcare industry. However, nonprofit organizations, including many dominant hospital systems, are currently exempt from FTC jurisdiction, despite being run in many ways like for-profit corporations. This means, for example,

that the FTC's recent rulemaking to ban non-compete agreements will not apply to nonprofit healthcare providers. Congress should expand FTC authority.

> *Existing Bill:* The Stop Anticompetitive Healthcare Act expands FTC jurisdiction to cover certain tax-exempt, hospital, and cooperative hospital service organizations.

Protect Healthcare from Private Equity. Private equity companies own an increasing number of hospitals, nursing homes, and medical practices, including practices that staff emergency rooms across the country. Private equity is reshaping our healthcare system by closing hospitals, slashing services, increasing prices, and firing doctors or cutting pay. Private equity acquisitions of healthcare facilities should be restricted or barred, as the California legislature attempted to do a few years ago.

INDUSTRIAL POLICIES AND U.S. ECONOMIC RESILIENCE

Protect Industrial Policy Investments to Build U.S. Manufacturing and Resilience. The Biden administration's new industrial policy initiatives and spending — the Bipartisan Infrastructure Law, the Inflation Reduction Act (IRA), and the CHIPS Act for semiconductors — could begin the long overdue transformation of our economy to create more diverse, competitive producers of key goods, to create good jobs for the two-thirds of working Americans without college degrees, and to counter the climate crisis. Congress must resist any attempts to water down the incentives to domestic production in the IRA, either through legislation or regulation, for example, by allowing electric vehicle subsidies to be sidestepped. And Congress must act to expand the coverage of Buy American procurement rules, including by closing massive loopholes that now allow many goods to evade domestic procurement requirements.

Stop Amazon's Tax-Dodging E-Commerce Imports. Amazon, other online retailers, and express shippers exploit a loophole in U.S. customs law called "de minimis," which allows millions of unchecked, unregulated packages to enter the United States without being taxed or inspected. Before 2016, only packages valued at less than $200 could take advantage of this type of informal customs entry. After Congress raised that threshold to $800, the Department of Homeland Security projected that 1 billion such de minimis shipments of imported goods purchased online arrived in 2022. Most come from China.

> *Existing Bill:* The Import Security and Fairness Act would prohibit goods from countries that are both non-market economies and on the U.S. Trade Representative's (USTR) Priority Watch List —such as China — from using the de minimis loophole.

End China Permanent Normal Trade Relations (PNTR). The U.S.-China Economic and Security Commission, a bipartisan, congressionally appointed exports panel, gave a unanimous recommendation that Congress consider ending the preferential trade status that Congress granted

to China in 2000 in conjunction with China's entry into the World Trade Organization. Not only have concerns about damage to U.S. manufacturing, employment, and national security been proven right, but they were understated. Ending PNTR would create more policy space for the U.S. to set and enforce conditions for Chinese goods having access to the U.S. market, such as ensuring fair labor standards and ensuring no unfair trade subsidies. This would generate more demand for both domestically produced goods and imports from more diversified locations.

TRANSPORTATION

Protect Air Passengers from Airline Misconduct. Airlines, unlike virtually every other consumer-facing industry in the country, benefit from their customers being de facto barred from pursuing their rights in court. The Airline Deregulation Act of 1978 bars anyone but the Department of Transportation from pursuing claims against airlines, ensuring that state attorneys general, state courts, and state legislatures cannot regulate the airlines as they do with nearly every other industry affecting their constituents. Congress should revoke federal preemption and restore the ability of state governments and private citizens to litigate against airlines in state courts.

Existing Bill: Economic Liberties' model legislation eliminates federal preemption for airlines.

UTILITIES

Stop Utilities from Lobbying with Consumer Dollars. America's utility monopolies, like gas and electric, are regulated industries that operate under public oversight that ensures they charge fair rates and provide reliable service. Under current law, however, utilities are allowed to use portions of consumers' utility payments to fund utility trade associations that lobby against consumers' and the public's interest, for example by opposing climate action, intentionally hiking rates, pollution controls, or policy to transition towards renewable energy. Congress should pressure the Federal Energy Regulatory Commission to reform the Uniform System of Accounts to classify industry association dues as presumptively non-recoverable from ratepayers and protect consumers from paying for utilities' political and lobbying activities.

II. CROSS-CUTTING POLICY AGENDA

ANTITRUST POLICY

Strengthen Price Fixing Law. Price fixing between competitors in the United States is illegal, but federal courts have added a range of procedural barriers and presumptions such that it is very difficult for those harmed by price fixing to win in court, even with meritorious cases and strong evidence. The procedural laws around price fixing litigation should be reformed to deter price fixing.

> *Existing Bill:* Competitive Prices Act

Ban Megamergers. Some mergers are simply too large to be justifiable on economic, political, or social terms. The political power afforded by the resulting companies is incompatible with either a democracy or a competitive economy. Congress should pass a law banning all mergers over a certain size, with no exceptions.

> *Existing Bill:* The Prohibiting Anticompetitive Mergers Act of 2022 bans all mergers over $5 billion.

Strengthen Merger Law against Roll-Ups and Small Acquisitions. Enforcement against anticompetitive mergers depends on the Hart-Scott-Rodino Act (HSR), which requires that all acquisitions over a certain size (currently $111.4 million) be reported to the FTC. However, many harmful mergers fall well below this threshold and thus are not required to report to the FTC. Furthermore, many businesses now operate with a strategy of making many small acquisitions ("serial acquisitions" or "roll-ups") that can cumulatively result in monopolies. Congress should lower the HSR thresholds for single transactions to $50 million, and require that any company making six or more acquisitions, of any size, in a single year also needs to submit an HSR notification to the FTC.

Protect Small Business from Power Buyers. Large "power buyers" like Walmart and Amazon use their bargaining power over suppliers to extract low prices. Their smaller competitors do not have access to these low prices, unfairly pushing many independent businesses out of the market. Power buyers also hurt workers: by squeezing the prices of suppliers, wages at those companies are suppressed. The Robinson-Patman Act prohibits this "price discrimination," but it has been weakened by the courts over the years and has rarely been enforced in recent decades. It should be reformed to cover services, limit exemptions for cost justifications, and eliminate the procedural barriers to enforcement that have been added by courts.

Overturn Bad Court Decisions. The courts have weakened antitrust law and enforcement for the past 40 years by reinterpreting it with a "consumer welfare standard," which has led to the concentrated economy of monopolies we have today. Congress can pass laws to simply overturn many of the most harmful decisions. They include:

- Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) (made it easier for corporate antitrust defendants to get their cases thrown out at summary judgment)
- Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (made it easier for corporate antitrust defendants to get their cases dismissed)
- Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (made it easier for corporate defendants to get cases dismissed)
- Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (encouraged telecommunications giants like Verizon and AT&T to monopolize the telecom market and ruled that monopoly profits were a necessary market incentive)
- Ohio v. American Express Co., 138 S. Ct. 2274 (2018) (legitimized the concept of "two-sided markets" to allow anticompetitive harm so long as someone in another market benefited)

Protect Honest Businesses from Predatory Pricing. For most of the 20th century, antitrust law banned "predatory pricing," in which a company would drive its competitors from the market by selling below cost, and thus at a loss, until their competitors went out of business. This would allow them to later raise prices to monopoly levels. However, antitrust law has been reinterpreted to require a "recoupment test" for predatory pricing, meaning that the victim of predatory pricing must prove that after they have gone out of business, the violator will be likely to recover their losses. Congress can overturn these decisions by passing a law to directly ban predatory pricing.

Restore Bans on Monopoly Tying. Antitrust law bans the conditioning of one sale on the purchase of an unrelated product or service, but the practice is still common. For example, Amazon uses connections between different parts of its business to extract more money from small businesses. Local businesses that sell on Amazon Marketplace are given preferential treatment in search results if they use Fulfillment by Amazon, even when doing so is more expensive than alternative shipping options. Though the case law is still reasonable, Congress should explicitly codify that tying is outright illegal for dominant companies and platforms.

CORPORATE GREED

Ban Junk Fees. Many companies deceptively tack on "convenience," "processing," "service," "facility," and other fees that do not correspond to any additional service. Not only do these junk fees

rip off consumers, they distort markets by rewarding companies who cheat and deceptively pretend to offer low prices before the fees. The White House recently launched an initiative on junk fees, and the FTC has recently opened rulemaking. However, Congress should ban these ancillary, deceptive, and unfair fees by passing an "all-in" pricing rule.

Ban Stock Buybacks. Many major corporations use their earnings and profits to repurchase their own company's stocks, which largely serves to boost the company's stock value, to which executive compensation is often tied. Evidence, however, indicates that stock buybacks largely come at the expense of the investment and business expansion required for economic and employment growth. The practice should be banned.

Existing Bill: Reward Work Act

Ban Golden Parachutes for Corporate Executives. Executives of companies facing a hostile acquisition are often offered enormous benefits packages as severance for when the merger is completed. These are essentially payoffs to not oppose the acquisition, and they often amount to tens or hundreds of millions of dollars. Since these mergers often lead to layoffs, Congress should prohibit such "payoffs for layoffs" schemes.

LABOR

Strengthen Workers' Right to Organize. Federal law formally guarantees most workers the right to organize and join a union, but there are many tools that employers use to intimidate employees or otherwise discourage them from exercising this right. Congress should pass legislation to ensure that employees are guaranteed the de facto right to unionize and exercise their collective bargaining rights.

Existing Bill: Protecting the Right to Organize (PRO) Act

Ban Non-Compete Agreements. Nearly 1 in 5 American workers are subject to a non-compete agreement, which prohibits them from seeking better wages or job opportunities elsewhere by working for a competing employer. There is overwhelming economic evidence that these agreements suppress worker wages and stifle innovation, and many low-wage workers in retail and hospitality are subject to them for no defensible reason. The FTC has recently proposed a rule to prohibit non-competes, but a statutory ban would be ideal.

Existing Bill: Workforce Mobility Act

Ensure Access to Justice for Workers. Many employers include arbitration agreements in their employment contracts, which require workers harmed by their employer to seek justice not through

the court system, but through an arbitration system designed by the employer. These agreements can deny workers access to the court system for wage theft, worker misclassification, and many other violations of the law. These arbitration agreements usually also prohibit class-action lawsuits, where cases are brought on behalf of many workers wronged by the same corporate lawbreaking. Congress should pass legislation to prohibit these arbitration agreements.

Reauthorize Trade Adjustment Assistance (TAA). Since the Kennedy administration, Congress has authorized the Trade Adjustment Assistance program in multi-year grants to provide extended unemployment benefits and retraining funds for workers who lose jobs to offshoring and import surges. In part because the TAA program provides an official accounting of the trade devastation to job and manufacturing capacity, it is opposed by the very advocates of job offshoring and the hyperglobalization that has made our supply chains so brittle. TAA benefits began to phase out in 2021, were terminated in June 2022, and were temporarily extended for one year in the 2022 year-end omnibus. They should be more permanently reauthorized.

Existing Bill: Trade Adjustment Assistance For Workers Reauthorization Act

PRIVATE EQUITY (PE)

Ban Sale-Leasebacks. Private equity companies will often sell off key assets of a company for quick infusions of cash but still need to lease that asset. For example, a PE-managed nursing home might sell the land it is on for cash to pay investors, but it needs to immediately lease the land back from the buyer, in what is known as a "sale-leaseback" agreement. As used by private equity, these agreements strip the company of assets to pay investors. They should be prohibited.

Ban Dividend Recapitalizations. Private equity firms often deploy dividend recapitalization once they have acquired a company. When compensating themselves or investors, rather than doing so out of a company's normal earnings, a private equity firm will have the acquired company take on debt in order to make special dividends to investors. This practice should be outright banned, as it sucks companies dry of funds needed for investment, growth, and hiring, and it over-leverages many companies to the point of bankruptcy.

Protect Retirement Savings and Limit Capital Available to Private Equity. Current guidance from the Department of Labor allows for 401(k) retirement savings plans to invest in private equity, through a letter issued in 2020. This allows private equity firms to solicit investments from employee 401(k) plans, a market of between $6 trillion and $7 trillion, to finance their roll-ups and buyouts. Furthermore, evidence indicates the PE investments are not even prudent investments, as they rarely outperform index funds once all of the relevant fees are removed. Congress should push the Department of Labor to withdraw this guidance. Alternatively, an amendment to the Employee

Retirement Income Security Act (ERISA) could prohibit PE and other alternative investments for employee benefit plans.

Restrict Leveraged Buyouts (LBOs). Private equity firms buy companies by financing the transactions with a huge amount of junk debt. Such "leveraged buyouts" often have the PE fund putting up tiny fractions of the acquisition price in actual money. The acquired company is often responsible for repaying the debt, whereas the PE investor is not liable for the losses. Such high debt loads are financially risky, but they also require the private equity firm to quickly increase the earnings of the acquired company, which is often done by aggressively cutting costs (particularly labor) and increasing prices. Legislation should limit the amount of debt acquirers can use to finance corporate takeovers — such that, for example, the resulting company has no more than four times its earnings before interest, taxes, depreciation, and amortization (EBITDA) in debt — and require investment firms that engage in such transactions to be jointly liable for the debts and other liabilities of the companies they acquire.

III. CONGRESSIONAL INVESTIGATIONS

There is no better way to create political salience around the monopoly problem than to use Congress' core oversight functions to examine how the American economy has been deformed by speculation, fraud, and monopolization. Here is a guide for members to run investigations to expose how common concentrated and dominant economic power is; how it raises prices, lowers wages, and engenders other harms, such as fragility in the supply chain of essential goods or services; and how particular companies contribute to the problem.

Congressional oversight, however, can go two ways. In one case, for example, on April 11, 2018, headlines read, "Zuckerberg outwits Congress," "Zuckerberg explains the internet to elderly senators," and "Why are politicians so bad at asking questions?"

By contrast, following the House antitrust hearing on July 29, 2020, journalists wrote, "Facebook's Zuckerberg skewered with internal emails," "tech titans hammered by Congress," and warned "digital gatekeepers face a moment of reckoning."

What was the difference between these two hearings? *Preparation.*

Here we show the necessary work and steps to avoid a "Zuck-explains-the-internet"-style hearing, and instead organize an impactful process like the antitrust investigation. It will explore the full range of tools that congressmembers and committees can use to create accountability.

GUIDELINES FOR INVESTIGATING

Identify and Define a Manageable Problem to Investigate

- Identifying the right problem for investigation is basic but critical. Investigative journalists, advocacy organizations, constituents, and others regularly identify problems that full committees, subcommittees, and personal offices can all investigate effectively.

- Define the problem as clearly as possible so the investigation is manageable and focused, and so that members know what to expect. For instance, the hearings on the Cambridge Analytica scandal allowed members to rail about a scandal but with no clearly defined problem. By contrast, the Big Tech investigation focused on the problem of market power.

- Match the scale of the problem to investigative resources. For industry-wide investigations, like the 2020 antitrust investigation, committees make more sense than individual offices because they have more resources. Individual members are well equipped to investigate the practices of single large companies or several companies' actions around a single event.

Identify the Major Players

- Defining the main targets of investigation is critical. This decision will set boundaries on where to look. It will also determine potential allies.

- Business rivals may be more likely to cooperate with an investigation if they are not targets of the inquiry.

Dedicate Staff Resources

- A good investigation should dedicate staff resources to developing deep expertise over an extended time frame.

- In some cases, a member or committee can hire experts, academics, or detailees from relevant agencies for the duration of the investigation.

- Advocates, executive branch regulators, and academics often have a shared agenda, and can serve as useful allies in offering legal and research aid.

Organize an Introductory Briefing for Unfamiliar Topics

- Members and committees alike can use initial meetings with industry experts to map out what questions to ask, and what information is necessary to close the knowledge gap between Congress and private industry players.

- Private briefings give the space for members and experts to speak freely and in deep detail without the pressure or performance of public hearings.

Organize an Introductory Hearing to Drive Press Attention

- An introductory hearing can set the tone for the investigation and build press attention around the narrative from initial testimony and questioning.

- Only hold a hearing when there is enough baseline familiarity that members generally know what answers they'll get from which witnesses.

- Initial hearings are better for demonstrating the direction of an investigation and building a public record than they are for gathering introductory information.

Request Information from the Major Players

- Requests for information (RFIs) are the main mechanism to gather documents from companies being investigated.

- RFIs can request internal communications, presentations, reports, and records. They can also ask for narrative explanations of practices or business decisions.

- RFIs will generally provide the bulk of the investigative record and are the foundation for later interviews and hearings.

Request Information from Third Parties

- Third parties, like competitors or experts in the field, should be encouraged to provide information. Generally, this is done by preparing a list of questions that third parties can answer with a voluntary submission.

- Follow-up interviews with third parties can provide additional leads for gathering information that staff would otherwise not know to request.

Negotiate over Information Production

- Companies or third parties may resist responding to information requests because Congress is not subject to the same confidentiality requirements as the other branches.

- A subpoena is a useful negotiating tool to compel disclosure. It can also allow friendly parties cover to provide more information than they otherwise would, and it can allow friendly witnesses to break nondisclosure agreements or other contractual prohibitions on sharing information.

Organize Interim Briefings or Hearings to Develop a Record

- As an investigative record develops, public hearings or briefings can help gather and contextualize information as well as set the public narrative.

- Behind the scenes, interviews and roundtables with particularly helpful third parties can help build political will and create informed member allies.

Review Information Production for "Hot Docs"

- As staff review production from the major parties, they should set aside documents that appear particularly incendiary or incriminating. These are crucial for public-facing statements and serve as excellent sources for public questioning.

- Hot docs can drive political coverage, sentiment, and also provide the basis for additional investigation and enforcement actions.

Organize Capstone Hearings

- Hearings with company executives should be capstone efforts in investigations. These hearings are not particularly effective as general fact-finding mechanisms. They are best for pinning executives down to public positions on a very small number of topics.

- This requires preparation, hot docs, and carefully curated questions that staff can share and coordinate with members beforehand.

Identify and Produce a Final Product

- The investigation should always seek to produce a final documentable product to provide a public record of the work for others to build on or reference.

- A report is one version, especially for larger investigations. But for smaller investigations, letters or other public-facing documents cataloguing the findings are equally valuable.

- Identifying the form of the final product earlier rather than later will help improve the quality of the product and also the quality of the investigation.

INVESTIGATION IDEAS

Policy Problems and Industries to Investigate. Large investigations into entire industries, like transportation or agriculture, require more resources and are likely to be better suited for committee investigations.

- Private Equity in Healthcare: The private equity industry has been buying up healthcare operations — spending $79 billion in 2019 alone — such that now the majority of practices are no longer doctor owned. Reports suggest this causes systemic harms to the health of the industry and to the health of Americans.

- Healthcare Abuses: This encompasses a number of pressing issues. Surprise billing is one, in which a patient is unwittingly treated by an out-of-network provider at an in-network hospital and asked to foot the bill. Similarly, the consistently high price of drugs, from insulin to Daraprim, is an evergreen oversight priority until the healthcare system is fixed.

- Transportation Consolidation and Abuses: The wave of airline mergers since 2007 has allowed airlines to increase prices and aggressively degrade the flying experience. Similarly, consolidation in rail lines has increased costs for Americans in freight rail and prevented innovation in high-speed rail.

- Agricultural Supply Chains: Agricultural seed and chemical supply chains are now dominated by three companies created by recent mergers: DowDuPont's Corteva in 2017, ChemChina-Syngenta in 2017, and Bayer-Monsanto in 2018. This has caused significant hikes in seed and chemical prices. The same is true in meat markets, where poultry, hog, and beef producers have consolidated, raising prices and destabilizing food supply chains.

- Defense Contractor Consolidation and Abuse: Committees may investigate systemic procurement issues, like rules preventing the military from repairing its own equipment, which creates cost overruns. Or they may provide oversight on specific companies, like investigating whether Northrup Grumman violated a 2018 FTC consent decree that required it to sell Orbital ATK products without discrimination.

- Investor Payouts with Climate Subsidies: The Inflation Reduction Act, the CHIPS Act, and the Bipartisan Infrastructure Law direct billions of dollars into certain industries and companies to encourage investments in climate technologies, domestic semiconductor production, and expanded infrastructure. Oversight is needed to ensure that these resources are used for the purposes set out by Congress rather than to compensate investors. There are already concerning signs; for example, the largest semiconductor companies benefiting from the CHIPS Act have long histories of aggressive stock buybacks and dividends. Similarly, private equity companies are buying up the climate technology firms and residential retrofitting companies that will benefit from the IRA, possibly aiming to capture government subsidies for investor payouts.

- The "Digital Trade" Agenda: Big Tech interests and some federal government agencies have been negotiating "digital trade" agreements with other countries, such as in the Indo-Pacific Economic Framework (IPEF). However, most of the digital trade proposals have very little to do with trade. They are instead attempts by Big Tech interests to tie the government's hands and prevent it from effectively regulating Big Tech. Congressional oversight could bring public attention to the issue and highlight this underhanded lobbying campaign.

- Utilities Corruption and Misconduct: Gas and electric utilities are notoriously bad corporate actors. Not only do they commonly shut off service illegally and unpredictably, utility monopolies also have been known to engage in bribery of public officials and sprawling dark money spending. Congressional oversight could highlight the problem and the need for reforms.

Companies or Events to Investigate. While Big Tech companies like Google, Facebook, and Amazon get a lot of attention, there is a wide range of companies with similarly harmful practices. Individual members can lead investigations into many individual companies. Any of the companies discussed throughout this agenda would be important to investigate, but some examples include:

- T-Mobile/Sprint merger: T-Mobile and Sprint merged in 2020, in a deal encouraged by the Trump administration DOJ and unsuccessfully challenged by many state attorneys general. The result has been higher prices and layoffs. Congressional oversight could increase pressure to unwind the merger and push for better merger review.

- CVS acquisition of Aetna: Health giant CVS acquired health insurer Aetna in 2018, creating conflicts of interests, with CVS now owning a pharmacy benefit manager, insurance company, and its own mail-order and brick-and-mortar pharmacies. The merged company frequently denies patient coverage of needed treatments and leverages its control of insurance to steer patients toward its own pharmacies.

- Essilor/Luxottica merger: Eyeglasses are too expensive, and market concentration is a big part of the problem. In 2018, lens manufacturer Essilor merged with Luxottica, the largest optical retailer in the United States, with LensCrafters and Pearle Vision stores and optical retail operations in

Target and Sears stores. The merger allows the company to squeeze other retailers out of the market and deny access to retail for competing manufacturers.

- Seed and Fertilizer Monopolies: A series of mergers and acquisitions during the Trump years consolidated the global biotechnology and chemical markets — where farmers get the seeds and fertilizer they need — into the hands of three dominant firms: Bayer, Corteva, and ChemChina. These companies lock farmers into proprietary crop systems, restrict their offerings of non-biotech seeds, and have introduced new "outcome-based pricing" systems, with farmers having little bargaining power to object.

- Meatpackers: Covid revealed many of the dominant meatpackers' labor abuses, including unsafe line speeds, terrible working conditions, and a near disregard for the risks from Covid. Two years of inflation have shown the anticompetitive problems in the industry, with meat prices going through the roof. Many of these companies have repeatedly been caught price fixing. Oversight could focus on discrete problems, like labor practices or price fixing, or particular companies, like Cargill, Tyson, or JBS.

- Cheerleading: Varsity Brands, owned by Bain Capital, controls American cheerleading. The company has iron-fisted control of the sport and has prevented it from becoming an official sport to avoid regulation and continue to abuse its athletes. It has also been complicit in the sexual abuse of cheerleaders.

- Textbooks and Research: The failed 2020 McGraw Hill merger is a red flag for abusive pricing in education materials. The same extends to academic publishers and research databases like JSTOR.

- UFC: Fighters have been battling UFC for fair treatment for years. Despite small victories in the courts, oversight of wage and labor abuses in the sport would turn up the pressure.

* * *

The American Economic Liberties Project is a non-profit and non-partisan organization fighting against concentrated corporate power to secure economic liberty for all. We do not accept funding from corporations. Contributions from foundations and individuals pay for the work we do.

economicliberties.us

@econliberties

info@economicliberties.us