

Senator Richard J. Durbin

William J. Baer

Nominee, Assistant Attorney General (Antitrust), U.S. Department of Justice

Questions for the Record

1. Please discuss the recusal policy you will follow if confirmed.

Response: I will abide by all existing laws and regulations and by the ethics pledge President Obama requires of his nominees. In short that means that, if I am confirmed, for a two year period, I will not be involved in matters in which clients for whom I have personally worked in the two years prior to my confirmation are parties. It also means that for the same two year period I will not be involved in matters where my current law firm -- Arnold & Porter LLP -- is representing a party. I will consult with and be guided by the Justice Department's ethics officer in complying with these limitations on my participation in Justice Department matters.

2. I believe it is imperative that we have a Justice Department Antitrust Division that will investigate and halt anti-competitive behavior in the payment card industry- an industry that plays an enormous role in our economy and has a troubling history of anti-competitive practices.

You have represented VISA, the largest payment card network, on antitrust matters. VISA has been the subject of a number of investigations by the Antitrust Division, including a recently-disclosed investigation into VISA's new merchant fee called the Fixed Acquirer Network Fee.

If confirmed, will you recuse yourself from Antitrust Division investigations and actions involving VISA?

Response: Yes. Visa is one such current client of mine, and therefore I would be subject to and adhere to the recusal rules set forth in my response to Question 1.

3. Under your leadership, can you commit that the Antitrust Division will carefully scrutinize the payment card industry and take appropriate investigative and enforcement actions when anti-competitive behavior is alleged?

Response: The Antitrust Division has a long record of vigorous enforcement in this area. To the extent I am able to participate in matters consistent with my ethics obligations, I will ensure that tradition is maintained. To the extent that I am recused from matters, I am confident that the leadership of the Department and of the Antitrust Division will make sure that all appropriate investigations and enforcement actions are pursued vigorously by the Justice Department.

4. In your confirmation hearing, you discussed your views on the issuance of exclusion orders by the International Trade Commission ("ITC") in cases where standard essential patents ("SEPs") have been found to be infringed. If confirmed, you may be asked to

express the Antitrust Division's views on proposals to limit the ITC's jurisdiction or limit its issuance of exclusion orders in cases involving SEPs.

Our current system of patent protection, with ITC playing its key enforcement role, has a long history of working well to encourage innovation and stimulate competition. When complaints of unfair practices arise, case-by-case adjudication of such complaints, including adjudication by the ITC, has been largely effective in striking a fair balance between the interests of patent holders, alleged infringers and the public. I believe that any significant changes to the current system should be cautiously considered in order to ensure that this balance is not unsettled.

Do you agree that any proposals to limit the availability of ITC exclusion orders in cases involving SEPs or to limit the use of the ITC as a forum for disputes involving imported products that allegedly infringe on SEPs should be made based on concrete data that demonstrates that our current system has a quantifiable problem with "patent hold-up," and not on the mere possibility of a "patent hold-up" problem?

Response: At my hearing, I endorsed the thoughtful and cautious approach to this issue recently expressed by Acting Assistant Attorney General Wayland and FTC Commissioner Ramirez. Both recognized the potential for antitrust harms that could arise from ITC exclusion orders involving SEPs and indicated that the ITC's existing "public interest" authority could be sufficient to address those situations. I agree that any suggestion to change current law ought to be based on real world experience demonstrating that the current framework is inadequate to protect consumers from antitrust harms.

5. If you are confirmed, will you solicit the views of the ITC, the Patent and Trademark Office, the U.S. Trade Representative, industry stakeholders, standard-setting organizations and consumer groups before expressing views on behalf of the Antitrust Division regarding the issue of ITC exclusion orders in SEP cases and the extent of any "patent hold-up" problem that may exist?

Response: I agree that consultation with the institutions and groups listed above is an appropriate process to follow before the Administration makes proposals to change existing law.