QUESTIONS FOR THE RECORD
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QUESTIONS FROM SENATOR BLUMENTHAL

Airlines

1. As a result of numerous horizontal mergers, just four airlines control 80 percent of flights within the United States. This lack of competition reduces incentives for airlines to be responsive to customer concerns – as the now-famous video of a customer being dragged off a United Airlines flight only confirmed.
    a. Would you agree that the airline industry is over-concentrated?
    b. What can antitrust enforcers do about it?
    c. Do you believe the DOJ should review past decisions if the conclusions about merger's impact on competition prove to be incorrect?

RESPONSE: Competition throughout the economy helps consumers reap the benefits of innovative, high-quality products and services at the lowest prices. Competition is particularly important in the airline industry, with so many American consumers traveling by air. In the airline industry, competition can take place in particular city-pair markets, some of which may have significant concentration, while others have multiple competitors, resulting in vigorous competition. Antitrust enforcers need to be vigilant in ensuring competition in the airline industry and fully scrutinize conduct and proposed mergers that diminish competition. I think it is important to understand the effects of past decisions to identify anticompetitive conduct that harms consumers and also to inform future enforcement.

Conditions

2. Antitrust regulators reviewing a proposed merger have three options: let the merger proceed, sue to block the merger, or allow the merger to proceed under certain conditions. Conditions imposed under the third option may range from requiring the new company to sell some of its assets to imposing specific limits on the new company's behavior. However, market forces or the limited enforcement bandwidth of antitrust agencies often limits the effectiveness of these behavioral conditions, sometimes leaving consumers to face a more concentrated market that provides worse quality at a higher prices, especially if those conditions are violated with impunity.
    a. What is your view of how merger conditions should be imposed?
    b. Can you name a merger for which conditions were not imposed but you believe they should have been?
    c. Can you name a merger for which conditions were imposed but you believe they should not have been?

d. Can you explain, in general, when you would reject suggested merger conditions and what you would do instead?

RESPONSE: As a general matter, I tend to believe structural relief has many advantages over behavioral relief when antitrust law enforcers are considering whether and how to remedy a competitively problematic transaction. I do not have the information and analytical data the agencies had before them in making individual determinations in past cases and therefore cannot judge the propriety of those decisions or whether conditions should or should not have been imposed on particular past mergers. Each case presents unique facts and circumstances that need to be taken into account in making any particular enforcement decision. As I noted above, I generally favor structural relief, where possible, over long-term behavioral relief.

Cooperation with State Attorneys General

3. Historically, State Attorneys General often work with the Department of Justice to enforce both state and federal antitrust laws.
   a. If you are confirmed, will you commit to cooperating with State Attorneys General, including sharing relevant information with State Attorneys General should they seek it?
   b. If I hear from one or more State Attorneys General that they have not received a response from your office about an antitrust matter, will you assure me that you will provide a response should I seek one?

RESPONSE: I believe it is beneficial to both the federal antitrust agencies and the states to cooperate in enforcement actions, including sharing relevant information where lawful and appropriate. If confirmed, I will commit to cooperating in appropriate cases with my state attorney general colleagues. As part of that cooperation, I can assure you that communications from the Antitrust Division will be timely and responsive to the extent information can be shared consistent with any constraints on sharing such information.

Transparency

4. During the presidential campaign, then-candidate Trump objected to AT&T's proposed merger with Time Warner, arguing that CNN—which is owned by Time Warner—has been unfair to him. Since President Trump made that statement, he has met with the CEO of AT&T. Separately, Jared Kushner has reportedly met with top Time Warner executives and complained about CNN's news coverage.
   a. What will you do to ensure that there is no political interference with your work, from the President and his associates or otherwise?
   b. Will you commit that if President Trump or anybody working on his behalf contacts you about a pending antitrust matter, you will inform the American people of that contact and make its contents of that communication public?

RESPONSE: I believe it is essential that all investigations conducted by the Antitrust Division are initiated and conducted in a fair, professional, and impartial manner, without regard to political considerations. Contacts from the President or the White House must comply with Department policies, including a 2009 memorandum by Attorney General Eric Holder. It is important that all antitrust investigations comply with Department policies, and that political considerations do not influence the handling of particular cases.

4. On January 27, 2017, White House Counsel Donald McGahn issued a memo entitled "Communications Restrictions with Personnel at the Department of Justice."[1] The first section of that memorandum details limitations on discussions between the White House and the Department of Justice regarding ongoing or contemplated cases or investigations.
   a. Are you aware of this policy?
   b. Have you undergone any guidance or training on this policy?
   c. Do you agree that it would be inappropriate for a White House employee to communicate with the DOJ about a specific pending antitrust enforcement or litigation action?
   d. Do you agree that it would be inappropriate for a White House employee to direct the DOJ not to file a lawsuit in a contemplated case or to continue an investigation?
   e. Are you familiar with any other policies currently in place that limit or otherwise address communications between the White House and all other law enforcement agencies, including those policies that affect active cases, contemplated cases, or investigations? What are those policies?
   f. Do you agree that imposing limitations on this type of communication between the White House and law enforcement agencies is important for the integrity of our nation's justice system?

RESPONSE: I am aware of the White House Counsel's memo entitled "Communications Restrictions with Personnel at the Department of Justice." As you note, this policy includes guidance limiting discussions between the White House and the Department of Justice regarding ongoing or contemplated cases or investigations. The White House Counsel's Office, through its ethics compliance program, provides training for White House staff.

As stated in the policy, it was issued to "ensure the DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence." Under the policy, White House staff are required to coordinate and clear with the White House Counsel's Office any communication with the DOJ on pending or contemplated investigations or enforcement actions and such communications are made only through certain designated senior officials at the DOJ.

I believe that it is essential that all investigations conducted by the Antitrust Division are initiated and conducted in a fair, professional, and impartial manner, without

[1] Memorandum to All White House Staff: Communications Restrictions with Personnel at the Department of Justice, available at: http://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000.

regard to political considerations. Contacts from the President or the White House must comply with applicable Department policies and guidance. It is important to ensure that all antitrust investigations comply with these policies, and that partisan considerations do not influence the handling of particular cases.

6. Please provide your opinion on the following recent mergers, including answers to the specific questions listed for each.
    a. American Airlines and U.S. Airways – This merger was approved with the condition that the merged company had to divest landing rights at key airports across the country.
        i. In your view, was this condition sufficient to protect consumers?
        ii. Is there anything that you would have done differently regarding approval of the merger, such as imposing additional conditions?
    b. United Airlines and Continental Airlines – This merger was approved only under the condition that the takeoff and landing rights for Newark Liberty Airport were transferred to Southwest.
        i. In your view, was this condition sufficient to protect consumers?
        ii. Is there anything that you would have done differently regarding approval of the merger, such as imposing additional conditions?
    c. AT&T and DirecTV – This merger was cleared by the DOJ without conditions; the FCC later imposed its own restrictions on the deal. But the Department of Justice concluded that there was no significant risk to competition.
        i. Do you agree with this outcome?
        ii. Is there anything that you would have done differently regarding approval of the merger, such as imposing additional conditions?
    d. AT&T and T-Mobile – This merger was ultimately abandoned by the companies after the DOJ and the FCC opposed the deal.
        i. Do you think this merger should have been approved?
        ii. Is there anything that you would have done differently regarding the Department of Justice's handling of the merger?
    e. Time Warner Cable and Comcast – This merger was abandoned after the Department of Justice expressed concerns that Comcast would become the gatekeeper for Internet-based services.
        i. Do you think this merger should have been approved?
        ii. Is there anything that you would have done differently regarding the Department of Justice's handling of the merger?

RESPONSE: With respect to each of the past merger decisions referenced above, I was not privy to the confidential information and analytical data the Department had in its possession at that time, and therefore am not in a position to comment. I can say that I have tremendous respect for the individuals who have served the American public in leadership roles and the career civil service staff at the Antitrust Division.

<u>Vertical Mergers</u>

7. As you know, a vertical merger is a merger between two companies in different points in the supply chain and do not compete directly against each other. For example, when a widget manufacturer buys a widget distributor, this is a vertical merger. Some economists believe that vertical mergers are always good for consumers. However, others have raised concerns that this kind of merger can increase companies' incentives and abilities to reduce competition and raise prices.
   a. Do you believe that vertical mergers can present competition concerns?
   b. If so, please describe the factors that you believe the DOJ ought to scrutinize particularly carefully when reviewing vertical mergers.

   RESPONSE: I think the majority of antitrust scholars recognize that most vertical mergers raise less serious competition concerns than horizontal mergers, which bring together firms competing directly against one another. One reason is that certain vertical mergers can create efficiencies that benefit consumers in a way that horizontal mergers may not. At the same time, there are instances where a vertical merger may have anticompetitive effects. As with any potential enforcement action, it is therefore important to carefully and closely assess the facts to determine whether there is, on balance, a harm to consumers flowing from the proposed transaction. The vertical mergers most likely to require a close look by government enforcers are those where there is risk that either upstream or downstream competition may be foreclosed by the transaction.

Market Scrutiny

8. Every potential merger presents a unique set of circumstances, including the industry in which the merger is taking place. Some industries have a history of questionable conduct, in some cases because a structural characteristic of the industry makes collusion or other abusive practices a tenable strategy. Separately, some industries implicate fundamental rights. For example, concentration in the marketplace for news doesn't just undermine the American economy, it undermines American democracy. Concentration in the marketplace for health care or health insurance denies Americans access to a commodity – health care – that is and ought to be a basic human right.
   a. In your view, are there any industries that require a greater level of scrutiny by the Department due to these or related factors?
   b. Specifically, do you believe there are industries with a track record of questionable behavior in the marketplace that merits additional scrutiny – for example, industries in which there are high barriers of entry, monopoly-like tendencies, or concentrated geographical areas?
   c. Do you believe that there industries in which consolidation may present a threat to core fundamental rights?
      i. Specifically, do you believe that media consolidations may merit additional scrutiny for this reason?
      ii. Do you believe that health industry consolidation may merit additional scrutiny for this reason?

d. The University of Chicago recently hosted a conference that discussed whether there is a concentration problem in America. What do you think the answer to that question is?

RESPONSE: It is certainly relevant for antitrust enforcers to understand the history of an industry, especially when that history involves previous antitrust law violations. The structural characteristics (e.g., high entry barriers) of an industry are also relevant to evaluating conduct and mergers under the antitrust laws. I believe that antitrust enforcers should be keenly aware of industries that affect American consumers in their everyday lives, such as health care and media. I did not attend the University of Chicago conference and I am not familiar with the discussions they held. I do believe that antitrust analysis is typically very fact based and focuses on particular markets. That said, when there is high concentration associated with a particular matter under review, closer scrutiny of the conduct or merger being reviewed may be appropriate.

Sherman Act Section Two

9. Over the last few decades, there has been a trend toward narrowing the scope of liability under Section 2 of the Sherman Act, and the Department of Justice and Federal Trade Commission have brought only a handful of cases under this law in recent years. The cases of *U.S. v. Microsoft* and *U.S. v. AT&T* demonstrated how important this law – and people willing to enforce it – are. As we see even more modern technologies, platforms, and complex intellectual property issues, Section 2 may be one of antitrust's most important tools for protecting competition.
   a. Do you believe that Section 2 can be used effectively to address harmful conduct that is the product of high levels of concentration?
   b. Will you commit to actively and aggressively using Section 2when warranted and appropriate as one of the tools available to the Justice Department to protect the competitive process and benefits for consumers?

RESPONSE: I believe that Section 2's prohibitions on anticompetitive monopolization and attempted monopolization are an important component of the nation's antitrust laws. If confirmed, I will support the Antitrust Division's efforts to enforce Section 2 actively and aggressively when warranted and appropriate to protect competition and consumers.

Online Platforms

10. Many large online platforms, in addition to providing access to users and a marketplace for suppliers, operate a variety of innovative health, content, banking, and other services themselves in direct competition with other suppliers.
    a. What should be done to ensure that these online platforms, which act as general Internet gatekeepers, don't discriminate in favor of their own downstream services to the detriment of robust competition and innovation?

RESPONSE: The antitrust laws cover unilateral and coordinated conduct in industries throughout the economy, including companies operating on the Internet such as online platforms. Over time, these laws have proven effective and adaptable to various types of anticompetitive conduct even as industries have evolved and technology has created new markets. If I am confirmed, the Antitrust Division will investigate and vigorously enforce the antitrust laws with respect to online platforms as I would in any industry, based on the economic and analytical tools appropriate to the circumstances and to ensure robust competition and innovation.

11. Internet-based platforms are highly valuable as well as extremely powerful, as they can often serve as both an operating system and a storefront for online services. Without safeguards, however, these tech platforms can create anticompetitive obstacles for rivals and tip the scales in an already sensitive market.
    a. What are the existing laws and guidelines that govern the competitive behavior of internet-based platforms and how they operate in the market?
    b. Can dominant platforms treat themselves differently than rivals or impose obstacles that keep rivals from competing?

RESPONSE: Section 1 and Section 2 of the Sherman Act govern the competitive behavior of businesses throughout the economy, including Internet-based platforms. Those laws prevent companies from engaging in conduct that harms competition without appropriate justification. Whether any particular conduct is an antitrust law violation will depend on the facts and circumstances surrounding the conduct. As a general matter, however, platforms with monopoly power may not engage in exclusionary conduct that harms consumers in violation of the antitrust laws.

Wages and Labor Conditions

12. Last year, the Obama administration called on states to take steps to reduce the use of non-compete contracts. The Department of Justice and the Federal Trade Commission also released guidance for human resources departments to identify wage collusion and announced that all such incidents of wage collusion would be criminally investigated.[2]
    a. Will your Department continue efforts to monitor and bring charges against wage collusion?
    b. Will you pledge to continue and strengthen the previous Administration's efforts to prevent employers from colluding to set wages and labor conditions, including but not limited to scrutinizing the use of non-compete contracts?

RESPONSE: If I am confirmed, the Antitrust Division will continue its efforts to prevent employers from colluding to set wages or engage in illegal anti-poaching agreements that hurt American workers. Companies that compete for workers that agree to end that competition by reaching an illegal agreement on the amount of

2 The White House, "Fact Sheet: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth," October 25, 2016, available at https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition.

wages they offer violate the antitrust laws and should be subject to full and vigorous antitrust condemnation.

Enforcement of Remedies and Consent Decrees

13. The strict enforcement of remedies is crucial to the work of the Antitrust Division. Currently, the Office of the General Counsel evaluates and oversees adherence to those remedies.[3] But with the advancement of data capabilities and technological innovation, proper oversight is only growing more challenging.[4] For example, the rise of algorithmic pricing and machine learning is bringing new dynamics to antitrust law.[5]
    a. What will you do to ensure that enforcement of conduct remedies and consent decrees is implemented effectively and consistently?

RESPONSE: I believe it is important to ensure that companies are abiding by the commitments they made in the Division's consent decrees and will be aggressive to ensure they are doing so.

3 U.S. Department of Justice Antitrust Division, *Antitrust Division Manuel*, April 2015, available at https://www.justice.gov/atr/file/761166/download.
4 John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy.
5 David Lynch, "Policing the digital cartels, Price-setting algorithms mean regulators must now tackle collusion among machines" Financial Times, January 8, 2017, available at https://www.ft.com/content/9de9fb80-cd23-11e6-864f-20dcb35cede2; Jerry Useem, "How Online Shopping Makes Suckers of Us All" The Atlantic, May 2017. available at https://www.theatlantic.com/magazine/archive/2017/05/how-online-shopping-makes-suckers-of-us-all/521448/.