

QUESTIONS FOR THE RECORD
MAKAN DELRAHIM
NOMINEE TO BE ASSISTANT ATTORNEY GENERAL
OF THE ANTITRUST DIVISION

QUESTIONS FROM SENATOR FEINSTEIN, RANKING MEMBER

1. It's my understanding that you were the primary lobbyist on behalf of Anthem and advocated in favor of its proposed merger with Cigna. The Justice Department successfully blocked that merger earlier this year. Because the litigation over the merger is still going on, you have pledged to recuse yourself from "any further involvement" in this matter if you are confirmed.
 - a. Do you believe your participation in matters related to the Anthem-Cigna merger would present a conflict of interest?
 - b. Please describe the steps you will take to recuse yourself from this matter.

RESPONSE: It is my understanding, according to press reports, that Anthem announced on May 12 that it was abandoning further efforts to complete the contemplated merger with Cigna. Having noted that, should there be any further activity associated with that merger, I will recuse myself from any involvement in this matter to avoid any conflicts of interest or appearance thereof.

2. I understand that the current Acting Assistant Attorney General, Andrew Finch, may also have a conflict of interest related to the merger because his former law firm represented Cigna.
 - a. Will you also take steps to ensure that he is recused from participation in matters related to the merger?
 - b. Assuming Mr. Finch is also recused from this matter, who will be the person in the Antitrust Division with primary responsibility for supervising the Anthem / Cigna matter?

RESPONSE: It is my understanding, according to press reports, that Anthem announced on May 12 that it was abandoning further efforts to complete the contemplated merger with Cigna. I am aware that Mr. Finch has been and is recused from working on the matter. My understanding is that a career Deputy Assistant Attorney General has the primary responsibility for supervision of the matter.

3. During a court hearing over whether Cigna could terminate its proposed merger with Anthem, Anthem's attorney repeatedly suggested that the merger would be cleared under the "new" Department of Justice in the Trump administration. Specifically, he told the court that "now Vice President Pence was supportive of the transaction as the governor of Indiana" and "we're reaching out to DOJ, which is new, by the way. There is a confirmed Attorney General, Sessions." The Anthem attorney made these statements even though the previous Attorney General concluded that the merger "would restrict competition for health

insurance products sold in markets across the country and would give tremendous power over the nation's health insurance industry to just three large companies."

- a. Do you believe that these statements were appropriate?
- b. Do you believe that the Antitrust Division's approach to determining whether a merger would have anticompetitive effects should change based on which party is in office?

RESPONSE: As I noted at my confirmation hearing, there should be no political influence in antitrust law enforcement decisions. I cannot otherwise speak to any statements that Anthem's representatives made well after my representation of the company ended. Indeed, I have been recused from any involvement in the matter since joining the Administration. The Antitrust Division's merger enforcement should be based, in any case, on application of the laws written by Congress to the particular facts and circumstances presented by the merger regardless of the party in office.

4. In March 2017, the International Business Times submitted a Freedom of Information request to the Antitrust Division seeking correspondence between you and members of the Antitrust Division while you were lobbying on behalf of the Anthem-Cigna merger. DOJ not only denied the request—DOJ refused to confirm whether any such documents exist. According to DOJ, even acknowledging any such communications without your consent would be "a clearly unwarranted invasion of personal privacy." I believe whether you corresponded with the Department of Justice about the Anthem merger and what you said are extremely relevant to our consideration of your nomination.
 - a. Did you correspond with DOJ during the time period you were lobbying on behalf of Anthem?
 - b. Will you agree to waive any privacy interest you might have in any DOJ documents that are relevant to the International Business Times' FOIA request?

RESPONSE: To the best of my recollection, my only communications with the federal government with respect to this matter were with Congress and I had none with the Department of Justice. The Freedom of Information Act (FOIA) promotes transparency and accountability in the government. If confirmed, I will strive to ensure that the Antitrust Division complies with all laws and regulations, including FOIA laws. I will respect any decision made by FOIA officials with respect to this request under FOIA.

5. You will oversee the Division within DOJ that is responsible for enforcing our country's antitrust laws. Many consumers don't think about antitrust laws. But the enforcement of these laws saves consumers millions, and in some cases even, billions of dollars each year. If confirmed, what will you do to protect consumers?

RESPONSE: If confirmed, my focus for the Antitrust Division would be on cartel behavior that raises prices or otherwise adversely affects the welfare of consumers; mergers and other forms of consolidation that risk a substantial lessening of competition; and single firm or collusive conduct that suppresses the free market

competition to which consumers are entitled. In recent years, international regimes have increasingly passed antitrust laws and started enforcement programs; accordingly, I believe that I should also focus on close consultation with competition enforcement officials from other jurisdictions in an effort to promote fair, transparent, and consistent application of competition principles for the benefit of American consumers, businesses and workers.

6. Over the last 12 months, we have seen an unprecedented increase in proposed mergers in the agriculture industry. Dow Chemical has proposed a merger with DuPont, Syngenta has proposed a merger with ChemChina, and Monsanto has proposed a merger with Bayer. While any of these mergers alone might not raise significant concerns, the prospect of these three mergers occurring around the same time, raises serious concerns. Will you review these mergers in isolation from each other or will you review them in light of the other pending agriculture mergers?

RESPONSE: While it would be inappropriate for me to discuss particular pending mergers, I believe in general that any merger should be evaluated in light of the facts and circumstances, including the likely future composition of the industry.

7. Many proposed mergers and investigations of anti-competitive behavior have significant impacts on my state and I believe it is important for state law enforcers to have an equal seat at the table with DOJ when that's the case. I know the Division often coordinates investigations and merger review with the states and I believe that is very important. Do you agree, and would you commit to continuing to cooperate with state attorneys general and other relevant state officials?

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.

8. Many online platforms benefit from network effects that make them dominant means for business to connect with consumers, giving them disproportionate power over the evolution of competition and the services available to consumers. Do you have any thoughts on competitive challenges in this area?

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.

9. In 2011, the Department of Justice sued to block AT&T's planned acquisition of T-Mobile. Since then, T-Mobile has played a critically important role in providing more choices and lower prices to consumers. Do you believe DOJ made the correct decision blocking this merger, and why?

RESPONSE: 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.

10. In 2014, Sprint appeared interested in acquiring T-Mobile, but was dissuaded from pursuing the transaction when the idea was met with skepticism by regulators who believed a merger that took the market from 4 national competitors to 3 wasn't good for competition or consumers. In 2013, the Department of Justice wrote to the FCC expressing concern about the threats to competition in the wireless market, specifically the concentration of valuable low-band spectrum held by the two largest carriers.
- a. What is your impression of the state of competition in the wireless market?

RESPONSE: I have not recently studied the state of competition in the wireless market and therefore do not have any particular impression regarding its competitiveness at this time. If confirmed and presented the opportunity, I look forward to studying it.

11. In 2011, DOJ approved the Comcast/NBC-Universal transaction with several conditions.
- a. Do you believe those conditions have effectively prevented the harms to consumers and competition they were designed to address?
- b. Those conditions are set to expire in 2018. Do you believe any of the conditions should remain in place?
- c. If not, how has the market changed to make these behavioral remedies unnecessary?
- d. If DOJ merger conditions are ineffective at addressing the harms to consumers and competition they were meant to stop, at what point should DOJ begin to take action to break up the merged firm?

RESPONSE: I was not privy to the information the Department had in its possession at that time, and therefore am not in a position to comment on whether the decision was correct or not.

With respect to the Comcast/NBC Universal transaction, I have not studied the merger action, nor its effects. If confirmed, I look forward to learning about the decree and its effectiveness. It is important for antitrust law enforcers to be confident that the remedies they impose will be effective with respect to the competitive problem identified when they take action against a merger. It is likewise important for parties that commit to conditions as part of the merger review to live up to those conditions and for the Department to vigorously ensure compliance.

12. Last fall, AT&T agreed to purchase Time Warner for \$85 billion. Since then, there have been suggestions that the AT&T/Time Warner deal could be a precursor for significant consolidation in the telecom, cable, broadband, and media industries - which are already significantly consolidated. As recently as last week, there were rumors that Verizon may look to purchase one of the two largest cable companies, Comcast or Charter, or a major media company like Disney or CBS.
- At what point is there too much consolidation?
 - Should merger reviews consider the potential for a transaction to spur a wave of consolidation that ultimately will prove to be harmful to consumers and competition?
 - Do you believe that vertical mergers should concern antitrust regulators?
 - If so, can you explain the harm or the danger that you think vertical mergers can present to consumers and competition?

RESPONSE: It would be inappropriate for me to discuss any pending mergers under review by the Antitrust Division. As a general matter, past consolidation is a fact that should be and is relevant in particular merger reviews, but it is hard to make any general statements regarding when a level of consolidation becomes too much. It depends on the facts and circumstances. 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 upstream or downstream competition may be foreclosed by the transaction.

13. You currently serve as Deputy Associate Counsel to President Trump. On May 9, 2017, President Trump fired the Director of the FBI, James Comey. On May 10, 2017, the Washington Post reported the following about Director Comey's firing: "Within the West Wing, there was little apparent dissent over the president's decision to fire Comey, according to the accounts of several White House officials. McGahn, the White House counsel, and Priebus, the chief of staff, walked Trump through how the dismissal would work, with McGahn's legal team taking the lead and coordinating with the Justice Department."
- When did you first hear that Director Comey might not stay in his position for the duration of his term?
 - How did you find out?
 - Who told you, and what reasons did that person give for Director Comey's removal?
 - Did you discuss it with anyone else?
 - Did you see any documents or emails about Director Comey's possible or actual removal beforehand?
 - When did you become aware that Director Comey would be removed from his position as FBI Director?
 - How did you find out?

- h. Who told you and what reasons did that person describe for his removal?
- i. Did anyone solicit your opinion as to whether Director Comey should be removed? If so, who?
- j. Did you tell anyone inside the Executive Office of the President your view as to whether Director Comey should continue as FBI Director?
- k. Did you tell anyone at the Department of Justice your view as to whether Director Comey should continue as FBI Director?
- l. Were you part of Mr. McGahn's legal team that "[took] the lead and coordinat[ed] with the Justice Department" regarding Director Comey's firing?

RESPONSE: I learned of the dismissal of FBI Director Comey on the evening of May 9, 2017, only through news reports.

14. On May 9, the President fired FBI Director James Comey. On January 30, the President fired Acting Attorney General Sally Yates. The President has made very clear that he will fire individuals who disagree with him or who pursue investigations against his wishes. Kellyanne Conway, one of the President's advisors, stated on May 11 that President Trump "expects people who are serving in this Administration to be loyal to the country and to be loyal to the Administration." Yet if confirmed, you will be called upon to exercise independence and to serve the American people, not the President.
- a. How can this Committee have confidence that you will be independent from the President?
 - b. What specific examples from your background offer evidence that you will not reflexively do what the White House wants you to do?
 - c. Do you believe it is important for the Assistant Attorney General of the Antitrust Division to be, first and foremost, "loyal to the Administration"?

RESPONSE: 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 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.

During my time in government service and private practice, I have been called on to advise clients on many sensitive matters. To the best of my recollection, I have never been in a situation where I have had to compromise my principles due to White House or other political pressure, including, in particular, my previous service at the Department of Justice. It is important for the Assistant Attorney General for the Antitrust Division to be, first and foremost, loyal to preserving and protecting competition through the sound enforcement of the antitrust laws and, if confirmed, that will be my loyalty in addition to my loyalty to the Constitution and to my ethical obligations as an officer of the court.

15. Please describe with particularity the process by which these questions were answered.

RESPONSE: The answers are my own and reflect my views. I discussed my answers and consulted with representatives of the Department of Justice as I deemed helpful and appropriate.