QUESTIONS FOR THE RECORD
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QUESTIONS FROM SENATOR FRANKEN

1. In January, after AT&T and Time Warner confirmed that they would structure their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have had to send to the FCC.

   Their response did little to address my concerns and instead was so bold as to state that the deal raises no anticompetitive concerns because it is vertical in nature. Top execs from AT&T and Time Warner wrote, "[the government] typically permits such mergers to proceed, imposes conditions to address any competitive risks, and narrowly tailors those conditions to avoid undermining the mergers' consumer benefits. Yet this merger presents no such risks at all."

   We've seen the risks before, and we've seen how successful merger conditions have been in the past. In the years since the Comcast-NBCUniversal deal was completed – a deal that you lobbied for – the combined company has faced complaint after complaint for engaging in anticompetitive behavior and not complying with conditions that the FCC and DOJ imposed on that transaction.
   a. Mr. Delrahim, without commenting on the pending transaction specifically, do you subscribe to the view that vertical mergers aren't cause for concern by antitrust regulators? And just because vertical deals have been approved in the past, do you believe that that means that all future vertical transactions should also be approved?
   b. And to what extent do you think the Antitrust Division should consider the enforceability of behavioral conditions and other remedies when determining whether to challenge a proposal?

   RESPONSE: As a general matter, while antitrust law traditionally has recognized that horizontal mergers potentially have a more direct effect on competition since they involve direct competitors, in certain circumstances vertical mergers indeed also can raise competitive concerns. I think every transaction should be reviewed based on its particular facts and circumstances. Thus, just because a transaction or particular types of transactions have been approved in the past does not mean that they could not raise competitive concerns in the future. With respect to remedies, 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. Evaluating the enforceability of any behavioral conditions should be an important consideration in determining the appropriateness of such a remedy.

2. I'd like to highlight something you once said with respect to media consolidation. At a 2003 speech before the Recording Artists' Coalition, you said, "media mergers do get somewhat

more public attention than other mergers because media is regarded as important to the functioning of a democracy. As a result, there has also been a fair amount of discussion of whether media deals should get a higher, or at least different, level of antitrust scrutiny."

I agree that any further media consolidation that could impact the free flow of information deserves the highest level of scrutiny. Allowing a select few corporations to pick and choose the content available to everyday Americans would absolutely threaten the basic principles of our democracy.

a. Mr. Delrahim, can you tell me what side of the discussion you referenced that you fall on? In other words, setting aside whether media mergers require a different standard, do you agree that the First Amendment – and democracy – should inform merger analysis in cases of media consolidation?

RESPONSE: I agree with you that media consolidation is an important public policy issue. When assessing media mergers the Division is obligated to follow the dictates of Section 7 of the Clayton Act, which provides that mergers that may tend substantially to lessen competition violate the statute. Typically, there is more likely to be antitrust concern about the competitive effects of a proposed merger in markets with a limited number of competitors. Thus, antitrust enforcement in those markets preserves additional competitors in the market. More competitors in the market often, but does not necessarily, equate with First Amendment values. For example, it likely, but not always, would be the case that Division enforcement under Section 7 of the Clayton Act to preserve competition will have the effect of preserving a diversity of media viewpoints. Also, as more programmers and media outlets compete for advertising and viewers, the likely result will be more diversity of programming choices. Additionally, as media technology improves, the likely result will be greater opportunity for diversity of programming.

3. The open internet is one of the most competitive marketplaces the world has ever seen, and the Antitrust Division needs someone who understands that net neutrality is the reason <u>why</u>. Because of net neutrality, an email from my constituent in rural Minnesota reaches me as quickly as an email from my bank. Because of net neutrality, the website for my local pizza parlor loads as quickly as the website for a national chain. Because of net neutrality, I can stream videos of my grandchildren just as easily as I can stream a hit TV show.

Should Chairman Pai move forward with his plan to undo the Open Internet Order, eyes may turn to the FTC and Antitrust Division to protect competition on the internet. But I don't think antitrust law alone can adequately protect the open internet.

a. Mr. Delrahim, what do you think? What role should the Antitrust Division have in protecting net neutrality?
b. Can you tell me then whether you agree that the FCC provides the DOJ with important industry expertise on matters of telecommunications and media competition?
c. And do you think that the nation's antitrust laws can address all the objectives of strong net neutrality rules?

d. Mr. Delrahim, during your time lobbying Congress on behalf of Comcast, did you ever lobby on the issue of net neutrality?

RESPONSE: To the extent that firms with market power take anticompetitive exclusionary actions to limit competition on the internet, the Antitrust Division can and should use the antitrust laws to protect that competition. It would not be appropriate to utilize the antitrust laws to reach objectives beyond protecting competition. While I have not been at the Antitrust Division for a number of years, during my time there the staffs of the FCC and Antitrust Division often communicated providing each other with insights and expertise. I expect that practice has continued and think it is valuable. With respect to my past representation of Comcast, it did not extend to issues associated with net neutrality nor its merger with Universal.

4. In the past, the FCC and DOJ have shared jurisdiction over media consolidation deals. This complementary jurisdiction is important because it ensures review by the technological experts at the FCC, who may be better equipped to understand how such a deal will impact Americans' access to affordable and essential telecommunications services. It also enables the FCC to take part in crafting narrowly-tailored behavioral conditions aimed at remedying harms that the finalized deal might pose to competition and consumers.
   a. Would you say that's a fair description of the overlapping jurisdiction?

The FCC has also had a critical role in ensuring merging companies are held accountable for the benefits that they argue their deal will bring. For example, in its review of Charter's proposed acquisition of Time Warner Cable, the FCC recognized that many of the companies' claimed benefits of the deal – such as internet speed upgrades and network buildout commitments – were not transaction-specific, meaning they were things the companies could already do – with or without the merger. So, when the FCC ultimately approved the deal, it ensured that the parties made a commitment to actually follow through on those claimed benefits – a commitment that is now legally enforceable by the FCC.

So let's quickly talk about AT&T and Time Warner. In January, after AT&T and Time Warner confirmed that they would structure their proposed acquisition to circumvent FCC review, 12 of my colleagues and I asked the companies to send us the public interest statement that they would have had to send to the FCC. While the companies were silent as to whether the deal would actually result in lower prices for consumers, they did discuss a number of consumer benefits that they say will arise out of their deal – including more relevant advertising and social media sharing opportunities. The companies also suggested that one major benefit of the acquisition is that it will strengthen their incentives to invest in the deployment of wireless broadband – specifically 5G. Ultimately, they say, this will promote competition in the broadband industry by allowing them to compete head-to-head with cable.

   b. Setting aside whether wireless deployment would in fact be a merger-specific benefit in the case of AT&T's proposed acquisition of Time Warner, how would the DOJ – without the assistance and enforcement capacity of the FCC – hold a telecommunications provider accountable for such a commitment? Or, can you tell me – assuming you cannot discuss the pending transaction – is it appropriate for the Antitrust Division to consider stated benefits of a deal – and whether they outweigh the substantial harms – if there is no way to ensure that a combined company actually acts to achieve such benefits?

RESPONSE: It would not be appropriate to discuss any merger currently pending before the Antitrust Division. Knowing of your keen interest in this area, I would like to note that in evaluating all transactions, it is important for antitrust enforcers to consider both the benefits and the harms of the deal, including the important question of whether, given the merger, the benefits alleged would, in fact, be realized and are merger-specific. With respect to shared jurisdiction, in a wide variety of markets the Antitrust Division talks to experts in particular industries to understand the implications of the merger and that can be and has been accomplished without overlapping jurisdiction.

5. In the past, I've expressed concerns about internet giants that use their positions as dominant platforms to stifle competition and may be – as a result – inhibiting the free flow of information.

In recent years, we've heard countless allegations of online intermediaries leveraging their market dominance to the detriment of content creators and innovative startups. And even more recently, we've seen how large of a role they play – particularly Google and Facebook – in shaping Americans' access to the news.

a. What would you do to address allegations that these dominant platforms' unilateral behavior is anticompetitive and may ultimately harm the free flow of ideas and content?
b. In the past, the FTC investigated Google's behavior in the search and online advertising markets, and it reviewed Apple's treatment of its competitors in the music streaming market. Can you explain how you believe the FTC and DOJ share authority over these online platforms? And do you think that the agencies' past divisions of responsibility should be maintained going forward?

RESPONSE: To the extent that companies with market dominance take anticompetitive actions to stifle competition, vigorous and timely antitrust enforcement is appropriate. If credible allegations of antitrust law violations are made, such allegations will be investigated if I am confirmed. The FTC and Department of Justice share certain antitrust jurisdiction over merger and civil nonmerger matters in many, but not all industries. For example airline and telecommunications mergers are subject to the jurisdiction of only the Department of Justice. Over the years the two agencies have developed a clearance process to ensure that only one agency reviews particular transactions or conduct. If I am confirmed, I will work closely with the Federal Trade Commission to review past divisions of responsibility and ensure that future divisions of responsibility between the agencies are both appropriate and efficient.