

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

QUESTIONS FROM SENATOR HIRONO

1. President Trump has met with the CEO of AT&T, as well as those of Bayer and Monsanto. These companies have pending mergers subject to review by the Antitrust Division.
 - a. Should the President have such meetings, and should he attempt to involve himself in these mergers?
 - b. Should the President disclose transcripts of his meetings with the CEOs of companies with mergers subject to US government approval?
 - c. How can you ensure that the Antitrust Division will be independent from the White House when evaluating and investigating merger activity so as to uphold America's antitrust laws?
 - d. Will you pledge to disclose any White House contacts on pending or potential antitrust matters?
 - e. Given concerns about the President discussing his disapproval of specific companies, including his opposition to the AT&T-Time Warner merger in particular, during his campaign, as well as about White House interference with the Department of Justice, what steps will you take to ensure a fully independent Antitrust Division?

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.

2. Sinclair Broadcast Group's proposed merger with the Tribune Media Company would give Sinclair stations in 42 cities, expanding its reach to a total of 108 communities. This merger has raised questions about media concentration as the combined company would serve close to three-quarters of U.S. households. In the past, Sinclair has drawn criticism for programming that benefitted then Republican presidential candidates Donald Trump and George W. Bush. Given reports of the President's continued attacks on the press, including reports of his threats to jail journalists, it imperative that consumers retain access to a diversity of news sources.

Not only can concentration in the media can lead to higher prices, but concentration can have the effect of limiting the number or diversity of viewpoints in a media market. Should consideration of effects like these be considered by the DOJ when examining a media merger? How?

RESPONSE: It would be inappropriate for me to discuss a pending merger. As a general matter, however, 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.

3. Regarding the AT&T-Time Warner merger, you've commented that you didn't believe it posed a "major antitrust problem." What specifically did you mean by that? And do you believe that by nominating you to head the Antitrust Division, the President is endorsing your view and that, despite his claim on the campaign trail, he won't act to stop the merger?

RESPONSE: As a general matter, antitrust law traditionally has recognized that horizontal mergers potentially have a more direct effect on competition since they involve direct competitors, than do vertical mergers and my comment was pointing out that understanding. I have had no conversations with the President regarding this merger. Nor have I been privy to the information currently being reviewed by the Antitrust Division. No one should infer from my comment that I have any preordained outcome in mind for this merger investigation, or was privy to any information necessary for a complete antitrust analysis. I think every transaction should be investigated and analyzed based on its particular facts and circumstances.

4. If confirmed, you will oversee the proposed merger of Monsanto and Bayer. Many small farmers in Hawaii are concerned about the potential increase in costs for inputs, such as seed and fertilizer, that this could cause. In January, the CEOs of Monsanto and Bayer reported in a joint statement that they had a "very productive meeting" with the President about the merger.
 - a. Has the President discussed the Monsanto-Bayer merger with you?
 - b. Do you know what was said in the meeting between the President and the CEOs of Monsanto and Bayer?
 - c. Soon, only three companies could control the entire agrochemical market, as opposed to the six that controlled most of the market in 2013. If only a few companies own the patents for seeds, this may be good for their shareholders, but small farmers could become completely dependent on them. Do you believe that this consolidation will harm small Hawaii farmers?

RESPONSE: I have not discussed this merger with anyone at the White House and I have no knowledge of anything that was said in the meeting your question references. Moreover, it would be inappropriate for me to discuss any pending merger investigation. I can say that the agricultural sector, including farmers, is important to the nation's economy, and I commend your and Chairman Grassley's vigilance in oversight of competition issues in this sector.

5. Last year, Aetna announced it would be pulling out of Affordable Care Act Exchanges in eleven states less than a month after the Administration announced it would sue to block their merger with Humana. In January, U.S. District Court Judge John Bates found that Aetna's public claims about their reasons for pulling out of the Exchanges were largely untrue, that

the withdrawal was retaliatory, and that Aetna's methods to conceal their process for deciding on withdrawal were done in a manner "specifically to evade judicial scrutiny." If confirmed, how would you address a case like this? Would this kind of pressure by a company—improperly using political leverage—impact your decisions and approach to mergers?

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.

6. In a February court hearing regarding the Anthem-Cigna merger, Anthem's lawyer repeatedly implied that the merger would be cleared under the new Trump administration's Department of Justice. He said: "I think it's important for the Court to understand that there are at least two pathways to a closing here. One is through appeal and the other is through resolution with a new DOJ. And the motion is intended to preserve those options, primarily." The American Medical Association subsequently wrote a letter to the Acting Assistant Attorney General for the Antitrust Division to express its "alarm" regarding these statements and stating its belief that "political influence should play no role in the enforcement of antitrust laws." At the end of April, the U.S. Court of Appeals for the D.C. Circuit ruled that the lower federal court did not abuse its discretion in preventing the two health insurers from merging.
 - a. Should politics play a role in the application of antitrust laws?
 - b. You lobbied on behalf of Anthem in its ongoing effort to merge with Cigna. Do you think your past relationship caused them to view the Trump administration as likely to be more favorable to them?
 - c. In 2012, you said that lobbying Congress on antitrust regulation could be effective, saying "[t]here's not a single assistant attorney general or FTC chair past or present that would admit he or she didn't care about or at least didn't listen to what members of Congress told them. They are always going to listen." Is this the advice you gave Anthem?
 - d. In your questionnaire, you said that you are "recused from any further involvement" in the Anthem-Cigna merger. What specific steps will you take to ensure that you will fully recuse yourself from the matter, and how will you avoid the type of influence you highlighted in your 2012 comments?

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. To the extent this matter is still active, I will recuse myself and follow the Department and Antitrust Division's policy of informing all appropriate personnel of my recusal. There should be no political influence in antitrust law enforcement decisions. I cannot speak to any motivations or considerations that Anthem's representatives had in making particular arguments

that were developed well after my representation of the company ended. My advice to Anthem was consistent with my advice to other clients that they should present the benefits of their transaction to a variety of people and groups that were interested in the effects of the transaction.

7. For years, US businesses and their mergers have been targeted for antitrust prosecution abroad—often in cases where the US agencies have decided that there is no antitrust concern.
 - a. Do you think that this is a problem that the Antitrust Division should address and, if so, how would you engage with foreign jurisdictions on this issue?
 - b. In some cases, US companies and their mergers have faced foreign antitrust reviews that appeared motivated by a desire to protect local competitors, or by other non-antitrust industrial policy considerations. How can the US help encourage antitrust enforcers to focus their efforts on protecting competition, rather than helping competitors or satisfying other political considerations?

RESPONSE: I firmly believe that antitrust laws should not be misused by foreign authorities to defend their national businesses or to try to exclude American businesses from foreign markets. The underlying basis for all antitrust actions, in the United States and elsewhere, should be appropriate legal and economic analysis. I understand that the Antitrust Division communicates this message to the international community in a number of ways. When I was a Deputy Assistant Attorney General at the Antitrust Division, one of my primary responsibilities was representing the Division's international affairs. In that capacity, I advocated strongly for foreign enforcers to apply sound, competition-based principles in their own enforcement efforts. If I am confirmed as Assistant Attorney General, I will support the continuation and strengthening of those contacts as well as exploring additional avenues to ensure American businesses and consumers are not harmed by discriminatory antitrust enforcement by foreign antitrust authorities.