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Questions for the Record
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QUESTIONS FROM SENATOR BOOKER

1. The metaphor of data as “the new oil” is somewhat inaccurate,[1] but there is no denying that venture capital investors oftentimes evaluate startups based on their ability to access or build data sufficient to extract rents, and gain insights into which competitors to copy, buy, or block.

   a. What is the best metaphor for the role data play in the platform economy?

   b. How important is it for a startup to have the data in the first place, compared with being able to invent with the research and infrastructure necessary to develop and cultivate those data? Which is the bigger barrier to entry?

A: The importance of data to a startup varies significantly depending on the nature of the business. For example, if a startup is in biotechnology and working to create new medicine to combat an intractable disease then clinical trial data is obviously integral to ensuring the medicine is effective and safe. In the consumer technology realm, startups sometimes collect user data in order to deliver a better, more personalized experience to the consumer; this approach can potentially create a data network effect whereby, as the startup’s service improves through personalization, the consumer spends more time on the platform enabling it to collect even more data. In some cases, these startups may also use this data to enable targeted advertising and generate advertising revenue. Data recency is typically important; in other words, old data tends to be stale and less valuable, while recent data that is fresh is more valuable. Therefore, a product or service that enables the ongoing collection of data can potentially build a competitive advantage.

2. I have focused extensively on how millions of American workers are limited in their ability to switch jobs because of “noncompete” and “no poaching” agreements—contractual provisions that forbid employees from leaving their job, and working for a competitor or starting their own business.[2] These provisions have been shown to reduce employee motivation, entrepreneurship, and knowledge sharing, all of which are integral to fostering innovation and growth.

   There are similarly restrictive contractual provisions throughout the tech platform industry—namely, exclusive contracts and loyalty contracts—that can be used to exclude nascent competitors. For example, long-term contracts that prohibit advertisers from using new entrants can stifle demand from that new provider, causing them to exit the industry prematurely. Similarly, contracts between platforms and advertisers that provide for individual negotiation can keep incumbents from losing unique targeted sales to new competitors without requiring the incumbent to lower prices across the board.

   a. There is a very strong case to be made that no-poaching agreements are unfair trade practices in violation of Section 5 of the Federal Trade Commission (FTC) Act. Should the FTC consider a rule banning these agreements?

A: I am not an expert on the Section 5 authority of the FTC. However, I understand this issue has received recent attention from members of Congress, including yourself, and I believe it is an area Congress should examine. In particular, I encourage you to evaluate whether these agreements are an impediment to entrepreneurship as employees at large companies may be prevented from creating a startup. Whenever possible, public policy should make it easier to engage in entrepreneurship because founding new enterprises is the main driver of growth in the economy.

b. Are there potential efficiency benefits that make it particularly difficult to challenge this behavior under existing antitrust law?

A: I am not an expert in antitrust law and therefore am not able to opine on how that body of law affects changes in this space.

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[1] *See, e.g.*, Antonio García Martínez, *No, Data Is Not the New Oil*, WIRED (Feb. 26, 2019), https://www.wired.com/story/no-data-is-not-the-new-oil.

[2] *See, e.g.*, Cory Booker, *The American Dream Deferred*, BROOKINGS INST. (June 2018), https://www.brookings.edu/essay/senator-booker-american-dream-deferred; Office of Sen. Cory Booker, Press Release, Booker, Warren Introduce Bill To Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov/?p=press_release&id=760.

c. Do the current safe harbors for "short-term" exclusive dealing arrangements capture the market power of dominant platforms, which, arguably, do not need long-term contracts to create the desired outcome from their partners?

A: Because I am not an expert on antitrust law, I do not have a view on how these arrangements interface with market power.

3. As we navigate the contours of crafting federal privacy legislation, one of the most intense recurring debates centers around interoperability provisions, i.e., the ability of consumers to control the use of the information they provide on one service on another service.

    a. What kinds of data should be portable?

A: I believe that when reasonable a company should be required to give consumers control over their personal data and allow them to decide which services get access to it and for what purposes.

    b. Generally speaking, how would a law giving consumers control of their data affect the viability and valuation of nascent tech companies?

A: Giving consumers control of their data would likely have a mixed impact on nascent tech companies depending on their business model. On the one hand, startups building products that could immediately provide a more engaging and personalized experience if consumers could port their data to them could benefit considerably. On the other hand, startups building products and services that collect unique and valuable consumer data that they hope to leverage for a differentiated user experience or for targeted advertising would likely be negatively affected by data portability.

    c. Does the FTC, as currently constructed, have the resources to effectively manage a behavioral remedy that mandated data sharing from bad actors?

A: I am not an expert on the FTC or its resources and therefore am unable to answer.

4. Ms. Nakache, you note in your testimony that merger and acquisition activity has largely displaced the initial public offering as the dominant exit strategy for venture capitalists. You also note that there is a long history of larger companies acquiring startups to complement an existing business or offer a new service. I believe that our country would be worse off if the garage entrepreneurs of Silicon Valley's past had all simply been trying to get acquired by IBM or Hewlett-Packard.

    Perhaps it is fair to rationalize that receiving some reward (from sharing in an existing platform's business model after being acquired) is better than no payoff at all. However, in your opinion, does that diminished incentive structure allow for the appropriate level of innovation?

A: I appreciate your question and commend you for focusing on how incentives can be established to drive innovation. I also wholeheartedly agree with you that our country has benefited from successful startups that have become iconic standalone companies. Public policy has an important role to play in creating an environment for startups to thrive and potentially become standalone public companies. For example, as I cite in my testimony, it has become very expensive and burdensome to be a public company due to changes made by Sarbanes-Oxley and Dodd-Frank. I encourage policymakers to address whether these issues can be addressed to encourage smaller capitalization companies to enter the public markets.

However, while the number of IPOs has declined over the last several decades, mergers and acquisitions (M&A) have always been the dominant liquidity path for venture-backed startups since most do not achieve the scale necessary to go public even at a "small cap" level. Therefore, I believe it is important to maintain the viability of the M&A path in order to sufficiently incentivize entrepreneurship.

Furthermore, there are other ways policymakers such as yourself can help support incentives for innovation. For example, immigration policy should make it easier for immigrant entrepreneurs to launch high-growth companies in the U.S. through creation of a Startup Visa. In addition, tax policy should reward long-term investment in new companies and allow young companies that are in a loss position to benefit from the R&D tax credit.