

Response to Written Questions Submitted by Chairman John Thune to Joe Simons

Question 1. There are a growing number of voices calling for responsible Federal Trade Commission (FTC) reforms, including those detailed in the transition report of the American Bar Association. How do you view the following proposed reforms:

Response. While the FTC must couple its Civil Investigative Demands (CIDs) with “resolutions” describing the investigation, the FTC has made a practice of issuing general, non-specific resolutions that some view as too vague to justify its CIDs. This can lead to overly broad investigations that lack focus and increase costs and burdens on business. What are your views on adopting a more targeted use of CIDs?

I am in favor of issuing resolutions that describe the investigation in as specific terms as are reasonably practical at the time of issuance.

CIDs also require approval from only one Commissioner. What are your views on the FTC ensuring that all Commissioners are notified before a CID is issued, so that the Commissioners can raise objections or otherwise act as a check in the process?

This suggestion is certainly worth considering, but does carry with it the possibility, or even likelihood, of substantially delaying investigations, which would need to be avoided.

The FTC can avoid the formality of obtaining a CID in a non-merger matter by issuing “Access Letters” to companies instead, which are often substantially similar to CIDs in composition and burden. While these are “voluntary” requests for information, companies typically feel compelled to comply. What are your views on the FTC’s use of “Access Letters” as a means of avoiding issuance of a CID for non-merger investigations?

Access Letters can be a useful tool when used in the correct way. They should be generally used to obtain preliminary information useful to a determination of whether fuller investigation is appropriate. This approach can involve a lower burden on both FTC staff and the parties, and can be more efficient.

Although the issuance of the CID is confidential, a company seeking to quash or modify a CID must do so publicly. This exposes the existence of the investigation, potentially leading to public scrutiny. Thus, companies may avoid challenging CIDs they view as unfair to avoid the possible reputational harm associated with publicizing an investigation. What are your views on a company’s ability to seek to quash or modify a CID without such petitions being made immediately public?

This is a suggestion I am willing to explore, if confirmed.

The FTC has been criticized for seeking permanent injunctions in its consent decrees without demonstrating a “cognizable danger of recurring violation.” What are your views on the FTC obtaining permanent injunctions only where it can show “some cognizable danger of recurring violation”?

I understand the concern. But since the question here is limited to matters settled by consent, the situations involved are all negotiated agreements, and thus there would be no opportunity to make any kind of formal showing of the type suggested. However, the Commission must always be mindful that the remedy it agrees to in a consent order is appropriate.

What are your views on the FTC adopting a more fact-specific and tailored approach to the standard length of 20 years for consent decrees?

If confirmed, I would like to consult with the career staff at the Commission as well as the other commissioners before coming to a view on this issue.

What are your views on instituting a process to expedite reconsideration of consent decrees older than 10 years?

I would be open to instituting such a process, but would like to confer with the staff at the Commission and my fellow commissioners.

What are your views on the FTC's Bureau of Economics issuing routine public statements providing a highlevel description of its economic analysis and rationale for consumer protection enforcement actions?

Public transparency regarding the methods used by the FTC is always helpful, but I believe the better approach is for the Commission itself to issue as much guidance as reasonably possible, which would combine inputs from both the Bureau of Economics and the Bureau of Consumer Protection.

Question 2. Regardless of your answers to the above questions, would you support the FTC conducting a workshop with stakeholders to examine these and perhaps other potential reforms that results in a report with recommendations for action?

Response. Yes, I would support a workshop on at least some and perhaps all of these issues.

Question 3. Where a merging party has filed for merger review under Hart-Scott-Rodino and has been unable to come to terms with the FTC, what are your views on the FTC voluntarily foregoing seeking a preliminary injunction and instead working with the merger parties to combine a preliminary injunction with a permanent injunction in Federal Court as has been recommended by the bipartisan Antitrust Modernization Commission?

Response. This sounds like a worthwhile approach, and if confirmed, I would be interested in examining it further.

Question 4. Given the proliferation of competition enforcers in the world today and the fact that data privacy laws are actively being revised and enforced in foreign countries, what role should the FTC play in relation to its counterparts in foreign jurisdictions? Additionally, what are your views on how the FTC can be a better proponent for the U.S. approach to antitrust and privacy in foreign jurisdictions?

Response. The FTC has for many years worked in close partnership with the Department of Justice Antitrust Division in advocating for sound competition enforcement around the globe,

and the FTC itself has been very active in international settings promoting strong but sensible privacy policies. Given the growing presence and significance of foreign authorities in these areas, such advocacy becomes even more important over time. The best tool here is constant and constructive engagement with foreign authorities, including partnering with other like-minded foreign authorities to emphasize the benefits of such an approach.

Response to Written Questions Submitted by Honorable Roger F. Wicker to Joe Simons

Question 1. To the best of your knowledge, please describe the FTC's ongoing activities related to identifying counterfeit lenses produced by Asian manufacturers.

Response. I do not have access to non-public investigations that may be ongoing at the FTC, and I am not aware of any public investigations. But I am aware the Department of Justice has obtained a plea agreement from the owner of Candy Color Lenses, who was sentenced to significant jail time. This DOJ investigation is part of Operation Double Vision, a multiagency effort including FDA, US Postal Inspection Service, and U.S. Immigration and Customs Enforcement.

Question 2. To the best of your knowledge, please describe the FTC's interactions with the FDA related to post-market surveillance of contact lenses.

Response. Although FTC does coordinate with FDA on a variety of issues, I am not aware of FTC interacting with FDA on post-market surveillance of contact lenses.

Question 3. To the best of your knowledge, what percentage of contact lens wearers in the United States have filed complaints with the FTC?

Response. I am not aware of what percentage of contact lens wearers in the US have filed complaints with the FTC.

Question 4. What other Class III medical devices does the FTC regulate through specific rules (i.e. pacemakers, implants, etc)?

Response. I am not aware of any.

Question 5. Many online companies are engaging in targeted advertising. Using consumer data, companies can target what they deem to be the most relevant ads to consumers. Should there be more transparency into how the algorithms behind targeted advertising work so that consumers can see how they are being targeted for certain messages?

Response. I would be happy to look into this issue if confirmed.

Question 6. Would third party audits of algorithms be a reasonable way to ensure the algorithms are doing what companies claim and not harming competition or consumer choice? Is this something the FTC might consider looking into?

Response. I would be willing to consider looking into this issue if confirmed.

Question 7. In 2007, when asked about monitoring domination in the advertising intermediation market and its impact on competitiveness, the FTC indicated that it would "carefully review" any attempts to manipulate products to any one entity's advantage. However, a decade later we are seeing platform dominance that is allowing a single entity to shape what products consumers see – and by that matter – access. This may be a problem for consumers looking for short-term loans online. If confirmed, under your leadership, what would the FTC do to ensure consumer choice in the online lending markets?

Response. The FTC enjoys broad authority to protect consumers from unfair or deceptive acts or practices, as well as to protect markets from unfair methods of competition. The goal of both is to assure that consumers are treated fairly, and enjoy as much choice as freely competitive markets can provide. If confirmed, I will confer with staff and fellow commissioners regarding online markets, including platform dominance in order to get a sense for what needs to be done to keep these markets free and fair.

Question 8. The Federal Trade Commission routinely reviews mergers between companies across a host of industries to help make sure that they do not adversely affect competition. This process can result in the Commission blocking a merger or approving it only if the parties agree to certain remedies to mitigate any potential anti-competitive effects. In this process, the Commission has the authority to pursue legal options to enforce a ruling, including administrative proceedings or pursuing an injunction in federal court.

I understand that for years standard practice was for the FTC to file for an injunction in addition to commencing an administrative proceeding under so-called “Part 3” of the FTC Act so that the party proposing the merger would have an early “day in court” the same way that it would if the merger investigation had been undertaken by the Department of Justice. I am aware of at least one case recently where this did not happen.

If confirmed and a merger were to come up for a vote during your tenure and the majority of Commissioners decided the merger shouldn’t proceed (at least not without remedies), would you commit to making sure that the FTC files for an injunction in federal court, to make sure that the parties have the same chance to defend the merits of the deal in court as they would if the merger had been reviewed by the Department of Justice?

Response. It is important that as a nominee, and potential Commissioner, I do not prejudge any case or party, but I am happy to discuss the issue of merger enforcement generally. There are benefits to the Commission’s administrative litigation path, including providing the Commission an opportunity to develop important questions of law. That being said, it should be used on the merits, and not to the disadvantage of any party, such as running out the clock. For example, if the FTC is denied a preliminary injunction in a merger matter, I do not believe the Commission should pursue that matter in administrative litigation.

Response to Written Questions Submitted by Honorable Roy Blunt to Joe Simons

Question 1. How does your experience in antitrust prepare you to lead the FTC in determining cases related to data protection and privacy?

Response. I know the agency very well from two previous stints with the Commission, when I developed a reputation as a vigorous enforcer. I have every intention of maintaining that reputation with respect to both the FTC's competition and consumer protection missions. If confirmed, I will work diligently with the outstanding staff at the FTC to make sure the Commission continues to aggressively protect consumers from deceptive or unfair acts or practices, including with respect to privacy and data security.

Question 2. Do you have any recommendations for stakeholders involved in the data breach debate that may help both industry and government entities find common ground on solutions?

Response. The FTC has a long tradition of inviting contribution and comment from stakeholders across industry, both inside and outside of government, when tackling the most difficult challenges confronting the agency. If confirmed, I will encourage all interested stakeholders to continue to participate and engage with the FTC as we study these issues and develop an enforcement agenda.

Response to Written Questions Submitted by Honorable Jerry Moran to Joe Simons

Question. The Federal Trade Commission (FTC) brought an enforcement action in July 2014 against a secondary market ticket provider and some of its “private label” partners. In this particular case, the FTC found that the “private label” partners were misleading consumers to believe that they were actually buying tickets directly from the venue and directed the private labels to engage in more disclosure. In other words, the FTC was not troubled by the development of the “private label” markets, but instead with the deceptive acts of the private labels in this particular case. Do you read this case in the same way?

Response. As online markets continue to develop, the emergence of private labels, in and of itself, is not necessarily problematic. We have seen such private label arrangements in many industries for some time. However, to the extent that these private labels engage in deceptive or unfair conduct, I will commit to pursuing enforcement to protect consumers and ensure the integrity of online markets.

Response to Written Questions Submitted by Honorable Dan Sullivan to Joe Simons

Question 1. As a former Attorney General of Alaska, I always appreciated coordination with federal agencies where appropriate, and the opportunity to communicate solutions that made the most sense for Alaskans. Given the importance of state attorneys general to the FTC's antitrust enforcement, please describe your views on the working relationship between the FTC and state attorneys general.

Response. A strong working relationship between the FTC and state attorneys general is critical to the FTC's ability to most efficiently and effectively fulfill its mission.

Question 2. As you know, the state I represent is unique which means its problems are unique and require unconventional solutions. In a highly rural state like Alaska, many communities are not connected by roads, challenging weather conditions prohibit timely delivery of mail and other essential services, and quality connectivity is considered a luxury. One of your objectives at the Commission is consumer protection and education. How will you ensure that rural constituents like mine have the tools they need to make informed decisions and in cases of abuse that require follow up, for example data breaches or identity theft, the information necessary to mitigate risks and resolve the issue?

Response. The FTC has long committed itself to consumer education and engagement. I absolutely appreciate that this becomes more difficult for citizens in rural areas, and if confirmed, I will confer with staff, including those posted in our regional offices, and take a hard look at how the agency can assure that consumers of all regions and ways of life have access to the tools the FTC provides.

Question 3. In your prepared statement, you discuss anticompetitive consolidation, which immediately called to mind the enormous market capitalization of tech companies. Recent calculations value the four largest tech companies' capitalization at \$2.8 trillion dollars, which is a staggering 24% of the S&P 500 Top 50, close to the value of every stock traded on the Nasdaq in 2001, and to give a different perspective, approximately the same amount as France's current GDP. Press reports have also noted allegations of increased anti-competitive behavior by some of these companies. Is there a point at which these companies are simply too big from an antitrust standpoint.

Response. Under the antitrust laws, big is neither necessarily bad, nor necessarily good. It can be good, it can be bad, and it can be both at the same time. Often, big companies get big by producing good products or services at low prices. If that is the case, the FTC should not interfere. If, however, companies get big—or, just as importantly, stay big—through anticompetitive conduct, then the FTC should intervene to stop such conduct and protect competition and consumer welfare.

Question 4. As Chairman, is there a former FTC Chairman that you admire and believe set forth the right vision and policies at the FTC? Who and why?

Response. I have had the great fortune to learn from two former FTC Chairmen, Bob Pitofsky and Tim Muris. As a law student, I studied with Chairman Pitofsky at Georgetown University

Law Center, played basketball with him in the weekly student faculty basketball games, and of course, observed his work as Chairman from outside the agency. With respect to Chairman Muris, I observed him from inside the agency as his Director of the Bureau of Competition. Both men exemplified the best of what an FTC Chairman should be – they demonstrated commitment to the agency’s mission, the highest degree of skill in the law, and unmatched knowledge of how to successfully run the Commission. Each had his own approaches and priorities, but each approach was bipartisan at the core, required active, vigorous enforcement, and the maintenance of high staff morale.

Response to Written Questions Submitted by Honorable Dean Heller to Joe Simons

Question. When Congress passed the Fairness to Contact Lens Consumers Act in 2003, it was a pro-consumer measure that ensured consumers automatically receive a copy of his or her prescription after an eye exam – without having to ask for it, pay an additional fee, or sign a waiver. Do you agree that consumers should receive copies of their prescriptions as Congress intended so that they can use the prescription to purchase their contact lenses from a source of their choosing?

Response. Yes.

Response to Written Questions Submitted by Honorable Jim Inhofe to Joe Simons

Question 1. The Federal Trade Commission routinely reviews mergers between companies across a host of industries to determine any antitrust implications. This process can result in the Commission requiring certain remedies to mitigate any impacts the Commission believes the merger would have on competition in the marketplace. Furthermore, should the Commission deny a merger, the Commission has the authority to pursue legal options to enforce a ruling, including administrative and federal district court proceedings. Legal proceedings, even when necessary, are costly, for both the Commission and the companies involved and can drag on for an extended period of time. Lengthy legal proceedings create uncertainty for the companies involved and in some cases result in a merger being blocked not on its individual merits but because the clock ran out on the proposed merger.

As a Commissioner, you will have a role in determining any and all potential legal proceedings that would result from a decision by the Commission. Do you believe that legal proceedings should focus on the merits of the matter before the Commission?

Response. Yes.

Question 2. Furthermore, what policies or procedures do you believe the Commission can implement to ensure legal proceedings focus on the merits of the matter and are not used to “run out the clock” on a merger?

Response. If the Director of the Bureau of Competition is properly supervising the career staff, this should not happen. And in any event, the Chairman should ensure that running out the clock does not occur. If confirmed, I will make sure this does not happen, and would encourage parties to notify me if they believe it is occurring.

Question 3. If a party to a matter before the Commission believes legal proceedings are being used to “run out the clock” on a merger, what remedies can be used by that party to address this issue?

Response. First, notify the Director of the Bureau of Competition, and if not successful, the Chairman.

Question 4. In a more general sense, how can the FTC work to ensure its merger reviews are resolved in a timely manner and that its merger investigation process takes into consideration both short and long term impacts to industries and consumers?

Response. If confirmed, I intend to conduct a review of the merger investigation process. Merger investigations are now averaging close to 12 months, up from 6 months or so just a half-decade ago. The Commission should reform the process to push back the length of investigations closer to the six month level. The current status is bad for competition, bad for the acquired company and bad for the FTC. It keeps target companies in limbo for too long, increasing uncertainty and causing loss of customers and employees – both of which are bad for competition. With respect to the FTC itself, the current length of investigations essentially dilutes the Commission’s resources. If time for investigations were reduced to six months, the Commission would be able

to handle roughly twice as many merger investigations or use the freed-up resources for more non-merger enforcement.

Question 5. The Federal Trade Commission plays a key role in investigating consumer complaints and has a number of tools at its disposal to promote fair competition in the market place. These tools range from educational efforts to imposing overly burdensome rules.

When considering how to respond to consumer complaints, do you believe the Commission has the guidelines or internal metrics necessary to determine an acceptable threshold for the increased costs associated with its rule makings or other remedial actions?

Response. Yes. The FTC has a large staff of Ph.D. economists capable of economic analysis along these lines.

Question 6. Should the Commission be required to consider less burdensome alternative options in certain circumstances, such as when the total number of complaints is a very small percentage of business transactions?

Response. In general, the Commission should strive to minimize burdens to the extent this does not materially diminish its enforcement efforts. While the agency should focus its enforcement resources on matters involving substantial harm to competition and consumers, the number of complaints is not always a useful metric in determining whether unfair or deceptive acts or practices are occurring.