

Questions for the Record from the Hon. Roger Wicker, Ranking Member

Question 1. Mr. Bedoya, do you support Congress developing comprehensive data privacy legislation that preempts state laws? Yes or no?

Yes. In an ideal world, Congress would develop and pass strong comprehensive data privacy legislation that would preempt state law. However, if the law were insufficiently strong, I would in turn support floor preemption.

Question 2. What would a strong data privacy law look like to you?

It is difficult to summarize in the abstract, but the following principles strike me as important. In my view, a strong data privacy law would:

- Not be technology-specific, anticipating future data streams and technologies, particularly with respect to biometrics;
- Include both consent-based collection restrictions and post-collection use restrictions;
- Include general fiduciary duties, such as a duty of loyalty; and
- Include provisions allowing for robust enforcement.

Question 3. Do you think consumers would be best served if all companies in the internet ecosystem are subject to the same privacy requirements (e.g. we should have the same rules for broadband providers, tech companies, advertisers, and retailers)? Why or why not?

I absolutely agree that ideally, all such companies would be subject to the same standard. The sectoral system has its strengths, but clarity and uniformity is not one of them.

Question 4. A study commissioned by the California Attorney General says that small businesses with fewer than 20 employees could incur up to \$50,000 in compliance costs for the CCPA. This is a cost that doesn't account for complying with other privacy laws. Do you believe that small businesses should be subject to a patchwork of state privacy laws? What protection would FTC rules give small businesses?

Ideally, all consumers and businesses would be subject to one uniform Internet privacy law rather than a patchwork of state laws; such a uniform law could include special provisions to address the needs of small businesses. Should the FTC use its authority under the Magnuson-Moss statutory framework to issue rules to address privacy violations, I would support provisions in that rulemaking to account for the specific needs of small business.

Question 5. Do you support the FTC developing privacy rules? Yes or no?

Yes. In an ideal world, the FTC would only issue such rules after passage of a bipartisan comprehensive privacy bill giving the FTC statute-specific rulemaking authority. However, as I indicated in my opening remarks at my confirmation hearing, I think that

we are in a privacy crisis. Therefore, I support the FTC using its congressionally granted authority to issue rules to combat unfair or deceptive trade practices affecting privacy. Those rules are issued under notice and comment rulemaking, including consultation with the public, stakeholders, and members of Congress, are only issued when a majority of the Commission supports them, and are of course subject to judicial oversight.

Question 6. If the FTC were to promulgate privacy rules, should those rules preempt state privacy laws? Why or why not?

If the FTC were poised to issue strong privacy rules, I would support preemption. If the FTC rules would undermine important state protections, then I would in turn support floor preemption. (In our earlier conversation, I had been under the misimpression that such rules would be preemptive as a matter of default; I now understand that is not the case.)

Question 7. Do you think FTC privacy rules should be considered a substitute for federal legislation? Why or why not?

No. It is imperative that Congress pass comprehensive privacy legislation. The FTC would only be able to issue privacy rules under its Magnuson-Moss rulemaking authority, which would reach only unfair or deceptive trade practices deemed to be “prevalent.” This likely does not encompass the full range of privacy invasions Americans face today.

Question 8. Mr. Bedoya, the FTC has long been known as a bipartisan agency. However, prior to Commissioner Chopra’s departure from the agency, there have been several 3-2 votes, the elimination of long-standing bipartisan policy statements at the Commission, and efforts to exclude minority commissioners from agency investigations. I am concerned about the growing politicization of the agency.

- **What will you do to help restore bipartisanship to the Commission, if confirmed?**
- **Will you publicly commit to supporting a return to regular order at the FTC by restoring the FTC minority Commissioners’ ability to approve and acquire information about new, Commission-led investigations? Yes or no?**

I am excited at the opportunity to work with all Commissioners, regardless of party. I also cherish the Commission’s reputation for bipartisanship, and recognize that it is strongest when operating in a bipartisan matter.

If confirmed, I commit to affirmatively look for areas in which I could work together with minority Commissioners and also commit to reach out to minority Commissioners to identify their process-related concerns and work to find a way to address them.

Question 9. Do you think the FTC has a role in overseeing the enforcement of Section 230 of the Communications Decency Act? If yes, what is the Commission’s role? If not, why not?

The FTC does not “enforce” Section 230 of the Communications Decency Act, but I understand that it may affect the FTC’s ability to combat deceptive and unfair practices under the FTC Act in some circumstances. I am also aware that there have been legislative proposals to reform Section 230. As a Commissioner, I would work closely with my colleagues, FTC staff, and members of Congress to identify ways in which Section 230 may be improved to better protect consumers and competition.

Question 10. Do you think content suppression by dominant online platforms– in the form of banning books, pushing down organic search results, or restricting apps on app stores – could meet the definition of an unfair practice under the FTC’s consumer protection unfairness policy test or competition unfairness principles? Why or why not?

I am acutely concerned with content suppression and manipulation by dominant online platforms. As a private citizen, I think it is a problem when one person or a handful of people effectively control the speech of hundreds of millions of people.

To constitute an unfair trade practice, a trade practice must (1) cause substantial injury to consumers that (2) is not outweighed by the benefits of that practice and (3) is not reasonably avoidable. This is a fact-specific analysis that will vary with the industry and the transaction in question; that said, I do not think it is implausible that content suppression or manipulation in particular contexts might conceivably constitute an unfair trade practice. In addition to these statutory factors, the FTC would need to assess whether the platform was exercising First Amendment-protected editorial control over the content it chooses to disseminate and whether the corporate statements were commercial speech.

Content suppression, for example manipulating search results to demote competitors, could constitute anticompetitive conduct that harms the competitive process. Content suppression conduct could take many forms and the analysis would require the consideration of a number of factors, depending on the conduct at issue.

Question 11. Prohibiting unfair methods of competition is an essential part of the FTC’s consumer protection mission. Could you please describe for the Committee your approach to competition policy and what experiences you will draw upon to address anticompetitive conduct in the marketplace, if confirmed?

I am committed to rigorous enforcement of antitrust laws, and believe that robust competition is critical to innovation and flourishing of small business.

As a general matter, I am acutely concerned with the level of concentration in the technology sector, and, if confirmed, plan to make antitrust enforcement on Big Tech a top priority. As I indicated in my confirmation hearing, I am also deeply concerned with anti-competitive practices affecting small businesses across all sectors.

As chief counsel to Senator Al Franken (D.-Minn.) I helped advise the Senator on his work into the Comcast-NBC merger. As a privacy scholar at Georgetown Law, I have

also become attuned to the privacy impacts of concentration in the tech sector. Many mergers and acquisitions in the tech sector create ever-larger pools of data.

Question 12. As you know, consumers and retailers are suffering this holiday season from supply chain disruptions that have reduced the stock of goods nationwide. There seems to be general agreement that the issues stem from carriers and terminal operations (such as empty container returns) and the lack of equipment (chassis), which are beyond the control of the retailer or cargo owner. Now the FTC plans to launch an investigation in which it will issue civil investigative demands (similar to subpoenas) to larger retailers, which appears on its face to be misdirected.

- How do you think the FTC's proposed "6(b) study" on supply chain disruptions facing this country actually help fix the problem right now by reducing the shipping backlog, restoring supply chain efficiencies, and helping lower prices for consumers?
- If confirmed, will you investigate and report back to this Committee on the principal reason why the Commission is spending valuable taxpayer resources using, in my opinion, the wrong tool at the wrong time?
- In your view, why do you believe the FTC is taking this action at all?

I do not have an opinion on this study, particularly since the 6(b) requests have not been approved and are not yet finalized. That said, if confirmed, I do commit to investigate and report back to the Committee on what I learn, in line with any confidentiality restrictions that apply to me as Commissioner.

Question 13. In a recent report surveying individuals in the AI research field, 85% of respondents "expressed confidence that appropriate public policies could help accelerate private sector development of new materials, medicines, and other innovations derived from AI technology." With Artificial Intelligence at the forefront of future innovation, what do you see as the FTC's role in regulating Artificial Intelligence?

I envision the FTC as providing consumers and businesses with educational materials that inform them of the strengths and weaknesses of machine learning technologies. I also think it is imperative that the FTC have the technical expertise required to enforce its consumer protection and competition mission despite the highly complex and occasionally opaque nature of machine learning-driven systems and technologies.

Question 14. The Federal Trade Commission has a vital role in stopping anticompetitive behavior. However, some members of the Commission have indicated that data can be a source of market power. AI requires large data sets, and the larger the data sets the better equipped AI is at avoiding unwanted bias. Further, companies make significant investment to gather data. How do you see the collection of data as a source of market power?

I have read that access to large pools of data -- for example, a company holding an individual's social "graph," or social network -- can serve as an effective barrier to entry

to new competitors. That said, I have not systematically studied the interplay between data collection and market power or competition more generally.

Question 15. A survey by the Security Industry Association (SIA) in 2020 looked at societies' view of facial recognition technology around public safety uses. That survey found that 66% of the public believe that law enforcement use of facial recognition is appropriate, and 57% were comfortable with its use in a database that includes their facial image. If society believes and has faith in the technology, do you think that government should still look to limit its use?

It is not clear from my review of the survey whether the 1,000 respondents were informed that face recognition searches typically occur without warrants and effectively in secret, or that people identified through these searches are rarely informed that they were found through the use of the technology. It would also appear, per the survey, that more than 4 in 10 adults are uncomfortable with the inclusion of their face in a law enforcement face recognition network.

That said, I do not believe that there is a one-size-fits-all approach to regulating police use of face recognition. For example, the Center on Privacy & Technology publicly supported Utah's state law regulating police use of face recognition, which does not ban or require a warrant prior to use of the technology but rather limits its use to certain violent crimes, and requires notice to those affected. While we have supported more stringent standards in other states, my primary concern has been that taxpayers are not informed of these practices, and that they should be afforded the chance to decide what the rules of the road should be for the technology.

Of course, the FTC does not have jurisdiction over law enforcement. That said, if confirmed, if this issue does somehow present itself before the Commission in an indirect manner, I will commit to working with my colleagues, FTC staff, and members of Congress on this complex matter.

Question 16. A recent report found that 68% of respondents believed the federal government should support the removal of subjectivity and personal bias from business processes through expanded use of AI and adoption of more robust standards and models. Do you agree that Artificial Intelligence can be used to reduce unwanted bias?

I agree that in theory that machine learning could be used in this way. At the same time, what I have learned is that many commercial vendors of machine technology make claims as to its neutrality without fully studying its differential performance across all sectors of society.

Question 17. Did you provide any assistance to the White House drafting the July Executive Order on Promoting Competition in the American Economy?

No, I did not.

***Question 18.* Do you commit to keeping the FTC independent and coming to decisions based on agency expertise and not White House requests or pressure?**

Yes, I do.

***Question 19.* Do you believe that FTC Commissioners have the legal authority to cast votes that continue to count toward a Commission majority even after they have departed from the agency?**

I certainly understand the concern with this practice. If confirmed, I will reach out to the Office of General Counsel to study this issue closely.

***Question 20.* Do you believe the Federal Trade Commission should provide more transparency into its proceedings by allowing the public to see orders on agency rules, guidance, and procedural changes several weeks before Commissioners vote on a matter?**

In general, I support greater transparency at all government agencies, including the FTC.

Questions for the Record from the Hon. Jerry Moran

Question 1. Do you believe the FTC should pursue a comprehensive data privacy rulemaking, even though this is a matter currently under debate in Congress?

In an ideal world, the FTC would wait until Congress passed a comprehensive data privacy bill prior to engaging in rulemaking, and would do so pursuant to the authority granted in that bill. Unfortunately, I think we are in a privacy crisis, and that crisis necessitates using the existing authority granted under Magnuson-Moss to issue rules curbing prevalent unfair or deceptive trade practices touching upon privacy – a smaller subset of issues that could be addressed as compared to privacy legislation. If the FTC does in fact conduct that rulemaking, and if confirmed, I will confer closely with you and your staff on your priorities and viewpoints.

Question 2. The FTC is a traditionally bipartisan institution in which consensus on tough issues is sought and stakeholders heard from. Will you commit to work in a bipartisan manner with your Commission colleagues to better serve the interests of the American people, if you are confirmed?

Yes, absolutely.

Question 3. It has been reported that, prior to leaving, former-Commissioner Chopra emailed several votes that are still being used to decide two-two cases on the Commission. I don't think it makes sense to use votes cast by a former Commissioner on cases that are very closely decided. I also believe it furthers the partisan tensions that the Commission is currently experiencing. Do you agree that using a former Commissioner's votes to decide close cases may be contributing to the lack of bipartisanship on the Commission?

I certainly understand the concern with this practice. If confirmed, I will reach out to the Office of General Counsel to study this issue closely.

Question 4. Chair Khan's "Vision and Priorities" memorandum to FTC staff in September suggests that the FTC should take a "holistic" approach to antitrust that "focus[es] on power asymmetries and the unlawful practices those imbalances enable." What do you believe constitutes a "power asymmetry," and when does it violate the antitrust laws? What analytical approach would you apply to power asymmetries other than the common law's traditional focus on market and monopoly power?

As this is not a term I have ever used or defined, I do not have an opinion on how one would analyze "power asymmetries" in an antitrust case. As a general matter, I am acutely concerned with the level of concentration in the technology sector, and, if confirmed, plan to make antitrust enforcement on Big Tech a top priority.

Question 5. Chair Khan has often spoken of "democratizing" the Commission's work. What does it mean to you to "democratize" the Commission?

I am not sure what Chair Khan was referring to specifically. Personally, if confirmed, I hope to serve as a Commissioner who actively reaches out to everyone. In general, I will do everything I can to hear opinions and get feedback from outside of the Beltway.

Questions for the Record from the Hon. Roy Blunt

Question 1. Earlier this year, the rural retail company Tractor Supply agreed to buy Orscheln Farm and Home, a Missouri-based family-owned business that has served Midwest rural communities with quality products for more than 55 years. One of the reasons the Orscheln family carefully chose Tractor Supply to purchase their company was because the latter embodied similar rural cultural values as Orscheln. In contrast to what might happen if Orscheln were to sell its business to a private equity firm, Tractor Supply would help retain the same quality and customer loyalty for which Orscheln was known. This would in turn help Orscheln survive in the face of competition from Internet giants like Amazon. Shortly after announcing the deal, however, the FTC issued a second request for information to extend the merger review process. It's been ten months since the parties have been negotiating with the FTC, and FTC staff haven't provided clear criteria or reasons for why the deal is anti-competitive, or what could be done to reach an agreement. In the meantime, both Orscheln and Tractor Supply have been bleeding massive amounts of money on attorney fees, with no end in sight.

- **Mr. Bedoya, do you think it would be a problem if Orscheln Farm and Home went out of business because it lacked the resources to compete with Internet-based platforms like Amazon and others that offer low prices and free shipping? Are you concerned about the devastating job losses this could cause in rural communities where Orscheln serves?**
- **Do you agree that the FTC merger review process should take into account the unique circumstances facing rural areas of the country?**
- **In reviewing mergers, should FTC staff communicate clearly to parties the criteria that would satisfy the FTC's concerns? Should the FTC do so in a timely manner and provide a date certain for the review to conclude?**
- **Are you concerned that if companies like Orscheln aren't able to close their deals in a timely manner, and are forced to become subject to burdensome consent decrees upon approval, they won't seek the FTC's approval before closing?**

I very much appreciate your concern with this case, but I believe that I should not comment on any matter currently before the Commission.

As a general matter, not specific to this case, I am deeply sympathetic to job losses in rural communities, particularly where one cannot easily change jobs without relocating family.

I also believe that the Commission should treat all parties before it with dignity and respect, and do everything possible to provide clarity into the review process and its criteria for evaluation.

Question 2. Some in the current administration want the FTC—which shares civil antitrust jurisdiction with the Department of Justice—to take a tough posture on merger activity. And, over the last year, the FTC has certainly taken steps to make the merger review process more time-consuming, expensive, and difficult for merging parties. One

example is the FTC’s decision to halt its practice of granting early termination requests for transactions identified as not posing a risk to competition. Another is the FTC’s new practice of sending “close at your own peril” form letters to tell parties that even if they’ve passed the statutory waiting period before closing, the FTC could still determine the transaction to be unlawful in the indeterminate future. There’s also the FTC’s party-line rescission of the vertical merger guidelines, as well as the new “prior approval” policy that gives the FTC veto power over merging parties’ future deals, both in the absence of any public comment. And the list goes on. In contrast, I’m concerned that making it too hard engage in merger transactions can have negative consequences. Mergers can benefit consumers by creating economies of scale, enabling greater investment in research and development, promoting innovation, and protecting a local business from closing. We also don’t want to make it too difficult for family businesses—like Missouri’s own Orscheln Farm and Home, which Tractor Supply Company agreed to acquire—to profit from their life’s work. Mergers can even save lives. For example, gene-sequencing company Illumina and its former start-up, Grail, state that they can accelerate the pace at which Grail’s early stage cancer screening—a simple blood test that screens for more than 50 different cancers in asymptomatic patients—can reach the market through a vertical re-acquisition to leverage Illumina’s scale and manufacturing and clinical capabilities. Yet, the FTC has been working to block the merger, in concert with the European Commission, even though both Illumina and Grail are American companies.

- **Mr. Bedoya, do you think there are ways the FTC could overreach when it comes to making it too difficult for companies to engage in transactions or acquisitions? If so, what are those ways?**
- **Are you concerned that the FTC’s decision to block the Illumina-Grail transaction may delay the public’s access to Grail’s lifesaving tests?**
- **Are you concerned that the FTC’s decision to block the Illumina-Grail transaction will disincentivize other companies from developing the next groundbreaking technology?**

I very much appreciate your concern with these cases, but I believe that I should not comment on any matter currently before the Commission. As a general matter, not specific to these cases, I certainly think that the FTC could overreach if it went beyond the statutory mandates with which it has been charged.

Question 3. Over the last several decades, the Supreme Court has held that the purpose of Congress’ antitrust laws is to protect consumers, not competitors.

- **Mr. Bedoya, do you have a view of the Supreme Court’s ‘consumer welfare’ theory of antitrust law?**
- **Would you adhere to the interpretation of antitrust statutes that the courts give?**

I emphatically support efforts to ensure that consumer welfare is interpreted in a manner that encompasses not just price, but also output, innovation, consumer choice, and quality. There are critiques of the standard as to its ability to protect competition with

respect to large technology platforms. If confirmed, I believe that I would be bound to enforce the antitrust laws in a manner in line with statutory intent and court precedent.

Question 4. This summer, President Biden signed an executive order on promoting competition, in which he encourages the FTC to promulgate rules in seven different areas of the economy, including through a catch-all direction to regulate “any other unfair industry-specific practices that substantially inhibit competition.” I’m concerned that such expansive language and assertions of rulemaking authority are not well-supported. After all, Congress never granted the FTC broad rulemaking authority to determine what is and is not an unfair method of competition. Rather, when Congress has given the FTC rulemaking authority, it has been limited very specific procedures and circumstances, and intended—in the words of former FTC Commissioner Maureen Olhausen—to “complement its case-by-case adjudicatory authority, not supplant it.” I’m also concerned that this approach wouldn’t be accepted by the courts. Just over a week ago, the U.S. Court of Appeals for the 5th Circuit decided to block OSHA’s emergency vaccine and testing mandate, stating that it raised separation of powers concerns “over the Mandate’s assertion of virtually unlimited power to control individual conduct under the guise of a workplace regulation” and that “Congress must speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” Mr. Bedoya, do you have a view of the Supreme Court’s ‘consumer welfare’ theory of antitrust law?

- **Mr. Bedoya, do you think that Congress has expressed a clear intent for the FTC to have broad rulemaking authority over the economy?**
- **Do you think there are limits to the FTC’s regulatory power, and if so, what are they?**

I do not believe that Congress has expressed a clear intent for the FTC to have broad rulemaking authority over the economy. It has, however, clearly given the agency authority to issue rules in certain circumstances, for example to curb prevalent unfair or deceptive trade practices (section 18).

I think there are clear limits on that regulatory power. For example, under section 18 Magnuson-Moss rulemaking, the Commission is only able to issue rules regarding unfair or deceptive conduct deemed “prevalent.” Even then, it has to give advance notice to Congress and ample opportunity for public comment, with the subsequent possibility of judicial review.

Questions for the Record from the Hon. Marsha Blackburn

Question 1. Senator Blumenthal and I, through our positions on the Consumer Protection Subcommittee, have held several hearings looking at the impacts of tech platforms on kids and teens. I understand you spent a good deal of your career focused on privacy issues and how privacy impacts different populations. How do you think Congress and the FTC should be addressing kids' privacy and kids' behavior online given the way that big tech platforms have penetrated our kids' lives?

As a parent, I am deeply concerned with kids' and teenagers' ability to navigate the Internet and tech platforms. This strikes me as one of the most urgent issues facing Congress and the Commission, and if confirmed, this would be a top priority for me.

First, I think that existing privacy protections for children should be extended to more teenagers, ideally through 17.

Second, I think that the actual knowledge standard in COPPA should be modified to a constructive knowledge standard.

Third, I think that Congress and the Commission should investigate the degree to which many of these technologies are affirmatively designed to addict people.

Fourth, I think that Congress and the Commission should comprehensively study the issue of addiction, ideally with the support of child psychologists and other subject matter experts.

Fifth, I think that Congress and the Commission should study the information asymmetries – a longtime focus of Commissioner Wilson's – that leave parents in the dark about the potential harms of technology on their children. As I indicated in my hearing, if confirmed I am particularly eager to work with Commissioner Wilson on the issue of children's privacy.

Question 2. I have watched with concern steps the FTC took recently to disincentivize merger and acquisition activity across all industries. For example, in September, the FTC withdrew its Vertical Merger Guidelines and then last month took steps to reinstate its prior approval authority for mergers it deems "anticompetitive." Do you agree with these actions? What clarity should businesses have when pursuing transactions before the FTC?

Both of these are actions which I would like to study further, if confirmed, particularly with the assistance of expert staff. I believe that the Commission should do everything possible to provide clarity into the review process and its criteria for evaluation.

Question 3. I have seen a number of tweets you posted over the last few years that were overtly political, including calling President Trump a "racist and white supremacist." You also served on the board of Free Press, an organization that has been explicitly partisan in

its approach. Do you believe you can be a fair and independent member of the FTC, rather than one who is beholden to political interests?

I appreciate the chance to address this. Yes, I do. I believe that my bipartisan work as a Senate staffer, my research and advocacy at Georgetown Law, and statements of support from Republicans, including both Commissioner Noah Phillips and Commissioner Christine Wilson and various former Senate staff colleagues, speak to my commitment to impartiality and bipartisanship.

In the Senate, I worked across the aisle (1) to build a bipartisan coalition of Senators to press the FTC and the Department of Justice to investigate and prosecute stalking app developers; (2) with the office of Senator Mike Lee to protect small businesses in the 2013 comprehensive immigration reform bill; and (3) with the office of Senator Dean Heller to help negotiate and craft the transparency provisions that eventually became part of the USA FREEDOM Act.

At Georgetown Law, the Center on Privacy & Technology my team's research on the federal biometric exit program supported bipartisan oversight of Customs and Border Protection by Senators Ed Markey and Mike Lee. My team's research on DHS face recognition searches of DMVs led to a bipartisan and bicameral oversight letter led by Senator Ron Johnson and Gary Peters.

As a private citizen and law professor, I did speak out on social media when I strongly disagreed with the actions or statements of elected officials, particularly when they affected my family. That said, looking back, there were many instances in which I said or shared things that I regret today. What's more, it could not be clearer to me that the role of commissioner is a law enforcement function that will require me to set aside all of my personal political beliefs and work across the aisle to protect American consumers and businesses.

If confirmed, I am committed to serving as an unbiased and impartial commissioner.

Questions for the Record from the Hon. Mike Lee

Question 1. During the hearing I mentioned that FTC Chair Khan is still “zombie” voting with former Commissioner Chopra’s proxy on matters before the Commission even though Mr. Chopra has left the Commission to be the Director of the CFPB. Do you support Chair Khan’s use of “zombie voting” on matters before the Commission?

I certainly understand the concern with this practice. If confirmed, I will reach out to the Office of General Counsel to study this issue closely.

Question 2. On July 1, 2021, the FTC voted 3-2 to rescind the Commission’s “2015 antitrust policy statement.” Do you agree with the Commission’s decision to rescind the antitrust policy statement? Why?

I do not know how I would have voted, as I was not present on the Commission and thus not privy to briefings or discussions between the Chair, the staff, and Commissioners. That said, I do believe it is clear from legislative history and the structure of the statute that section 5’s unfair methods authority was meant to go beyond the confines of what is prohibited under the Sherman and Clayton Acts. Further, I believe that if the agency is to be called upon to protect competition in the face of large and powerful technology platforms, it needs every tool at its disposal.

Question 3. During the hearing, you noted that you agreed that the FTC should use its Section 5 authority to engage in rulemaking on “unfair methods of competition.” What specific rules do you believe the Commission should undertake using this authority? And are those rules “expressly delegated?” What limits (if any) are there to the use of this rulemaking authority?

I do not have a preconceived idea of what rules should be issued under a section 6(g) rulemaking on unfair methods of competition. It does appear to me that the authority has been expressly delegated to the Commission by Congress. Rulemaking under section 6(g) would be subject to the constraints of the Administrative Procedures Act.

Question 4. During the hearing, you mentioned that you needed more time to consider whether you were in agreement with the FTC’s recent decision to withdraw its Vertical Merger Guidelines. Do you support this decision by the Commission? Why?

I would like to study this further, if confirmed, particularly with the assistance of expert staff. I believe that the Commission should do everything possible to provide clarity into the review process and its criteria for evaluation.

In general, I am acutely concerned with vertical integration among large technology platforms, and believe that this practice has harmed competition in the tech sector.

Question 5. During the hearing, I asked about the FTC’s 3-2 decision to eliminate procedural rules related to Magnuson-Moss Section 18 rulemaking authority. Do you support this decision by the Commission? Why?

Yes, I do. I believe that the Commission should be nimble in its ability to curb prevalent unfair or deceptive trade practices, and that the statutory requirements of Magnuson-Moss rulemaking – which cannot, as a constitutional matter, be undermined by any agency action – remain quite robust.

Question 6. During the hearing, you noted that you supported the FTC’s decision to only require the support of a single commissioner to sign off on investigations as opposed to the practice of having a majority of Commissioners. Why do you support this decision? Does this decision avoid a collaborative, bipartisan process at the Commission?

I believe that the agency needs to be nimble in its ability to respond to potential instances of unfair or deceptive trade practices or threats to competition. It is my understanding that using omnibus authorizations for investigations has been the longstanding practice of the Commission in its consumer protection work, and that this move has brought the Bureau of Competition in line with the Bureau of Consumer Protection.

Question 7. There was a recent case called LabMD v. FTC where the 11th Circuit vacated an order by the FTC because it found the FTC lacked specificity in its order and commanded LabMD to meet an indeterminable standard for reasonableness. What lessons should be learned from the LabMD case? Are there changes that you would implement to prevent this abuse of power that the 11th Circuit identified?

I believe that it speaks to the fact that section 5 is a less than an ideal means through which to protect data security. This is why I believe it is imperative that Congress pass strong and detailed data security legislation to protect business and consumer data.

Question 8. Our country is in a nationwide debate regarding online political bias and censorship. Tech CEO’s often make promises in public about how their company operates in the marketplace. How often have we heard public statements that say, “We don’t sell your data” or “You own your data” or “We don’t censor your data or content.” Or how about Twitter CEO, Jack Dorsey, who stated: “We do not look at content with regards to political viewpoints or ideology. We look at behavior.” The statements may or may not be true. But in the internet context, it’s become a common complaint from consumers that what a CEO says or how a company holds out their businesses operations is different than how the platform operates. If consumers are harmed by relying on these CEO or corporate statements, is this an area that the FTC could find constitutes a “deceptive trade practice?”

- **I believe consumers could benefit from increased tech company transparency regarding these particular business practices. And I along with Senators Moran and Braun have introduced S. 427, the Promoting Responsibility Over Moderation In the Social-Media Environment (PROMISE) Act, which would require greater**

consumer transparency over these business practices by requiring companies to disclose their content moderation practices and follow through on these promises made to consumers. Would increased transparency and disclosure from these tech companies empower consumers?

- **And do you support my bill, the PROMISE Act?**

I am acutely concerned with content suppression and manipulation by dominant online platforms. As a private citizen, I think it is a problem when one person or a handful of people effectively control the speech of hundreds of millions of people.

A deceptive trade practice involves (1) a claim or material omission that is (2) likely to mislead a reasonable consumer, (3) to that consumer's detriment. In addition to these statutory factors, the FTC would need to assess whether the platform was exercising First Amendment-protected editorial control over the content it chooses to disseminate and whether the corporate statements were commercial speech. This is a fact- and law-specific inquiry that will turn on the industry and the transaction in question.

That said, as a general matter, if a technology platform claims to run content moderation in one way, but does it in a different way in a manner that misleads most reasonable consumers, and in a way that harms them, then it is conceivable that under certain circumstances this could constitute a deceptive trade practice.

I absolutely think that greater transparency and disclosure from tech companies empower consumers. The PROMISE Act strikes me as a simple and strong step forward towards that goal.

***Question 9.* The Congress is actively debating federal data privacy legislation? What is your stance on federal data privacy legislation?**

- **What should the regulatory definition of "data" constitute?**
- **Do consumers "own" their data? Is there a limit to a consumer's ownership rights over data?**
- **What consumer "harms" or "injuries" should the government prevent or have rules that protect against?**
- **What is a consumer's "reasonable expectation" of privacy online? What information should a consumer be presented with regarding the use of their data?**
- **Is preemption a necessary component of federal data privacy legislation? If so, to what extent?**
- **Is a private right of action (in any form) a necessary component of federal data privacy legislation?**
- **In your opinion, should the Commission be granted additional APA rulemaking power to carry out data regulations? And what rules should the Commission pursue under Section 5 to address data privacy concerns?**

I used to be a skeptic of federal comprehensive privacy legislation, but now I believe that Congress has the will and expertise to issue a strong comprehensive privacy law, and strongly support this effort.

I don't have a preconceived view of what "data" should encompass, but I do think that any regulatory regime must try to anticipate future data streams and technologies, and be sufficiently flexible to encompass them, either directly or through expert rulemaking.

While I have occasionally used the expression that you "own" your data, I have tried to avoid it as I do not think it adequately captures the nature of sensitive data, or the fact that consumers sometimes pay for a service through their data.

I believe that data privacy legislation should protect against non-consensual collection of sensitive information and the use of sensitive information in a manner that a reasonable consumer does not expect or in a manner that breaches a duty of loyalty to that consumer. I also believe that sensitive data collection should not occur in secret.

Generally speaking, I think that consumers reasonably expect that their sensitive information will not be collected without their knowledge or consent, and that it will not be used to their detriment. I believe that consumers should be informed of what data is being collected from them, what it will be used for, who it will be shared with, and when it will be deleted.

In an ideal world, Congress would pass a strong federal data privacy law, and that law would preempt individual state standards. If Congress were unable to pass a strong law, then floor preemption would be appropriate.

I have generally supported private rights of action as effective means to protect consumer privacy. However, there are good faith arguments to limiting them.

I do think that Congress should grant the Commission APA rulemaking power to implement any data privacy legislation, as existing section 5 rulemaking is limited, under section 18, to a subset of prevalent unfair or deceptive data practices.

Question 10. As you may know, the FTC first implemented the Contact Lens Rule in 2004 after Congress passed the Fairness to Contact Lens Consumers Act. And last year, the FTC unanimously approved an amended version of the Contact Lens Rule. I'm a strong supporter of the Rule, which requires contact lens prescribers to give their patients a free and portable copy of their lens prescription and keep a record of the patient's receipt of prescription. This allows patients to shop around in a competitive marketplace and choose the option that works best for them. Are you a supporter of the Contact Lens Rule and the FTC's efforts to enable a competitive marketplace?

Yes, and as a contact lens user I am a beneficiary of this rule.

Question 11. The FTC has scheduled a ten-year regulatory review of the Business Opportunity Rule, which requires business opportunity sellers to give prospective buyers specific information to help them evaluate a business opportunity. Do you have any views on the FTC’s review of the Business Opportunity Rule? And will you commit to ensuring that small businesses are not met with unnecessary regulatory burdens?

- **If confirmed, will you commit to objectively considering all public comments and conversations during this regulatory review to ensure that consumers are protected and small businesses are shielded from burdensome regulations?**

I do not at present have any specific views on the Rule. I am, however, sympathetic to the specific needs of small businesses and will of course work to ensure that they are not met with unnecessary regulatory burdens.

Yes, if confirmed, I will gladly commit to this.

Question 12. What is your stance on the FTC’s authority to use 13(b) to pursue restitution or disgorgement? Given that the Supreme Court recently ruled that the FTC unlawfully used Section 13(b) to seek equitable monetary relief, would you support Congressional efforts to ensure use of this authority for this purpose is accompanied by procedures that ensure due process?

Section 13(b) has been a critical tool to return millions of dollars to American consumers and businesses. I support the Commission’s bipartisan effort to give the Commission the ability to seek monetary relief for consumers and businesses. In general, I always support efforts to protect due process, but am concerned that moving to a process such as that allowed under section 19 would unnecessarily delay the return of ill-begotten funds to victimized consumers and businesses.

Question 13. Section 6(b) is used by the FTC to require a company to file reports or answers in writing to specific questions about its business practices. When should Section 6(b) authority be used? Should there be limits to its use?

- **The production of documents is expensive. How would you balance the invocation of the authority with the expense to the business?**

I think that section 6(b) is a powerful tool to allow the FTC to learn about business practices in a way that informs and refines future enforcement actions. While section 6(b) is a broad authority, the Paperwork Reduction Act imposes significant limits on that authority. The Commission would require approval from the Office of Management and Budget (or a waiver from Congress) to send the same set of questions to more than nine entities, or to entities that comprise a substantial majority of an industry. If confirmed I will keep in mind the burden of document production on businesses prior to approving such a study.

Questions for the Record from the Hon. Ron Johnson

Question 1. You stated during the hearing, that you believed “that if the Commission is to be called on to police Big Tech, that it needs every tool at its disposal.”

- **What are the tools at the FTC’s disposal?**
- **What is your philosophy on policing Big Tech?**

The FTC has a broad range of tools at its disposal, from consumer and business education, to investigations, law enforcement actions, consent decree monitoring, and, in some circumstances, rulemaking.

I am concerned that large technology platforms have come to dominate our personal and professional lives and, indeed, our society, and that they have often used that power in a way that violates our privacy and stifles competition.

Question 2. You are known to be a critic of surveillance technologies.

- **What are your views on the digital surveillance tools used to censor illegal and illicit content on social media platforms?**
- **What are your views on expanding these tools to censor content based on political viewpoints?**

I support targeted efforts by social media platforms to protect against illegal or illicit content. For example, I support automated comparison of user-uploaded images to law enforcement databases of hashed images of child exploitation in order to identify and take down matching images.

I am emphatically opposed to the use of any tools to censor social media content based on political viewpoints.

Question 3. Do you believe that censorship of political viewpoints by social media platforms is an unfair or deceptive practice?

As a private citizen, I think it is a problem when one person or a handful of people effectively control the speech of hundreds of millions of people.

A deceptive trade practice involves (1) a claim or material omission that is (2) likely to mislead a reasonable consumer, (3) to that consumer’s detriment. In addition to these statutory factors, the FTC would need to assess whether the platform was exercising First Amendment-protected editorial control over the content it chooses to disseminate and whether the corporate statements were commercial speech. This is a fact- and law-specific inquiry that will turn on the industry and the transaction in question.

That said, as a general matter, if a technology platform claims to run content moderation in one way, but does it in a different way in a manner that misleads most reasonable

consumers, and in a way that harms them, then it is conceivable that under certain circumstances this could constitute a deceptive trade practice.

Question 4. Will you commit to ensuring the continued independence of the FTC?

Yes, absolutely.

Questions for the Record from the Hon. Rick Scott

Question 1. Last Congress, I introduced the PRIME Act (S. 2208, 116th Congress), which would require online retailers to display the country of origin for each products they sell. Do you believe the FTC has the authority to enforce such a law?

Yes, I do.

Question 2. What authority do you believe the FTC has to protect the privacy of Americans' data online, and if confirmed as FTC commissioner, what actions would you take to protect the personal data of Americans online?

The Commission's principal privacy authorities fall under section 5 of the Federal Trade Commission Act, specifically its prohibition against unfair or deceptive trade practices, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and the Fair Credit Reporting Act.

I am committed to rigorously protecting Americans' privacy. If confirmed, on my first day as Commissioner, I would do two things on this front.

First, I would make it a priority to investigate practices targeting children online, specifically practices that deny parents information regarding the harms presented by online platforms.

Second, I would urge the Commission to act more aggressively to combat the threat posed by "stalking apps," which allow domestic abusers to secretly geolocate and track their victims, and which remain frighteningly prevalent in the U.S.

Question 3. In the past, you have been politically active on social media. If confirmed as FTC commissioner, will you promote the right to free speech on online platforms and protect consumers from censorship practices that are being used by multiple social media platforms?

I believe in the right to free speech. As a private citizen, I think it is a problem when one person or a handful of people effectively control the speech of hundreds of millions of people.

I am also a proponent of free speech. The issue is that, if I am confirmed, I will myself become a government official, and my own actions with respect to social media companies will be subject to First Amendment scrutiny.

One potential avenue to address misleading content moderation might be the FTC's authority to combat deceptive trade practices. A deceptive trade practice involves (1) a claim or material omission that is (2) likely to mislead a reasonable consumer, (3) to that consumer's detriment. In addition to these statutory factors, the FTC would need to

assess whether the platform was exercising First Amendment-protected editorial control over the content it chooses to disseminate and whether the corporate statements were commercial speech. This is a fact- and law-specific inquiry that will turn on the industry and the transaction in question.

That said, as a general matter, if a technology platform claims to run content moderation in one way, but does it in a different way in a manner that misleads most reasonable consumers, and in a way that harms them, then it is conceivable that under certain circumstances this could constitute a deceptive trade practice.

In my view, the clearest resolution to this particular problem would be congressional action.

Question 4. President Biden recently sent a letter to the FTC urging them to investigate whether oil and gas companies are intentionally keeping gasoline prices high.

- **As an independent agency, do you believe investigating is a request or a requirement from the President of the United States?**
- **Do you believe that the FTC has the appropriate authority to undergo this investigation?**
- **What would your focus and scope be for this investigation if you are confirmed?**

The FTC is indeed an independent agency, and so the letter would constitute a request rather than a requirement, and the agency would not be obliged to follow it.

If heightened gasoline prices were a product of conduct prohibited by the Sherman Act, the Clayton Act, section 5 of the FTC Act, or any other of the laws that the Commission is charged with enforcing, then I do believe the Commission would have the authority to conduct the investigation.

I am not expert in the nature of oil and gas markets, and so, if confirmed, I would rely on the advice of staff to effectively oversee the investigation.