SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION:
QUESTIONS FOR THE RECORD

FROM THE NOMINATIONS HEARING
ON APRIL 21, 2021

Written Questions Submitted to Lina Khan, Nominee to be a Federal Trade Commissioner

Submitted by Ranking Member, Senator Roger Wicker

Question 1: *Privacy and Challenges with Duty of Loyalty Requirements*
Ms. Khan, last Congress, I introduced the SAFE DATA Act with Senators Thune, Blackburn, and Fischer. This legislation would provide consumers with strong data privacy rights and protections, and it would establish clear rules of the road for businesses across the country.

Do you support Congress developing bipartisan data privacy legislation that establishes strong data protections for consumers and clear rules for businesses to follow?

- **Follow Up:** in December you co-authored an article in the Harvard Law Review entitled "A Skeptical View of Information Fiduciaries," where you questioned the adequacy of imposing fiduciary duties, such as a "duty of loyalty," on online platforms.
  In fact, you questioned the "feasibility" and "coherence" of this idea (p. 504) and later stated that you see "little constitutional upside" to the information fiduciary proposal and "significant policy downside" (p. 530).
  Could you please elaborate on these views for the Committee and discuss the challenge of enforcing a fiduciary-like responsibility on online platforms, an issue you also discuss in the article?

Response:

A national privacy law seems critical. Given persistent information asymmetries in digital markets and enforcement challenges that the FTC has faced, ensuring that any new privacy rules are clear and administrable will be paramount.

"A Skeptical View of Information Fiduciaries" was a co-authored academic article responding to a proposal outlined by Professor Jack Balkin. The article questioned how Professor Balkin's proposal would fit with existing fiduciary obligations and state law. More broadly, the article unpacked the analogy that Professor Balkin's proposal draws between online platforms and their end users, on the one hand, and traditional professional fiduciaries (like doctors and lawyers) and their users (like patients and clients) on the other. While I wrote this article in the context of a scholarly debate, if I am confirmed I would look forward to considering how various legislative proposals could robustly safeguard user privacy.

Question 2: *Name, Image, and Likeness Legislation*
Ms. Khan, this committee is working to develop bipartisan legislation to permit college athletes to be compensated for the commercial use of their name, image, or likeness. The FTC's expertise in consumer protection matters will be an important asset in overseeing this new marketplace. If confirmed, will you commit to working with this committee to ensure the FTC has the appropriate personnel expertise and resources to effectively oversee the protection of student athletes and their families in this new market in college sports?

Response:

Yes, if confirmed I would be happy to work with the Committee as it addresses this important issue.

Question 3: *FTC Contact Lens Rule*
Ms. Khan, eye doctors have complained that some online sellers use automated robocalls to take advantage of the current "passive verification" system to sell consumers contact lenses not prescribed by their eye doctor. In your view, what if anything, can the FTC do to address the problem of robocalls in the contact lens regime's passive verification system?

Response:

On June 23, 2020, the Commission announced final amendments to the Contact Lens Rule. The rule included updates to requirements on sellers seeking to verify prescriptions from prescribers. If confirmed, I would seek to hear from eye care professionals about the impact the recent amendment to the rule may be having on their business, including whether the rule is contributing to robocalls received by eye doctors. Understanding potential obstacles faced by eye care practitioners seems especially important given that many independent practitioners have struggled during the pandemic.

Submitted by Senator Jerry Moran

Question 1: Given the recent Supreme Court decision to limit the FTC's authority under Section 13 of the FTC Act, what factors should Congress consider when deciding whether and how to bolster the FTC's authorities under this Section? What limitations to the authorities should be considered?

Response:

Over the last few decades, the FTC has used Section 13(b) of the FTC Act to secure billions of dollars in relief for victims of unlawful conduct, including anticompetitive pharmaceutical practices, telemarketing fraud, privacy and data security violations, and scams that target seniors and veterans. When considering legislative action in the wake of the Supreme Court's decision limiting the FTC's Section 13(b) authority, lawmakers should aim to guarantee that the FTC can (1) secure monetary redress for victims of unlawful conduct and (2) ensure that market participants do not profit from lawbreaking. In some instances, Congress has imposed certain limitations on the Commission's remedial authorities, such as a statute of limitations. If confirmed, I would be happy to work with your office to discuss the potential impact of any additional remedies or limitations that Congress may wish to include in future legislation.

Question 2: The FTC has been successful in seeking six billions of dollars in fines for data privacy violations since 2018, while the EU has collected 329.8 million dollars in the same time period. This underscores the importance and effectiveness of the FTC in pursuing misbehavior in the data privacy area. However, there are still data breaches and hacks that have led to the exposure of consumer data, and other behavior that must be addressed to ensure the data privacy and security of Americans.

What do you believe are the critical aspects of a potential federal data privacy standard? What role do you believe the FTC should play in enforcing a federal data security and privacy standard?

Response:

Given the prevalence of behavioral ad-based business models, one basic question for any federal privacy law is whether it changes a firm's underlying incentive or ability to engage in chronic user surveillance. Another important question is whether the law is administrable, or whether it instead presumes capacities that enforcers lack.

To the extent that Congress grants the FTC additional statutory authorities in this area, the FTC generally should (1) scrutinize the underlying business incentives that may be encouraging abusive data practices, and (2) use the full scope of the remedial toolkit to deter lawbreaking. If confirmed, I would look forward to considering how various legal proposals could safeguard user privacy and security.

Submitted by Senator Dan Sullivan

Question 1: Under what circumstances should the FTC utilize its administrative litigation power? And do you believe that the FTC should try more cases before its administrative law judges?

Response:

The FTC Act lays out a set of authorizations and limitations that inform whether the FTC pursues action through federal court or administrative process. For example, when scammers violate certain rules, the FTC Act authorizes the Commission to seek restitution, damages, and other relief in federal court. This seems particularly appropriate given the federal judiciary's ability to award relief and to make victims whole. The Commission cannot seek this full range of remedies administratively. In some instances, the Commission may have a choice as to the forum in which it should pursue a matter. If confirmed, I would work with my fellow Commissioners and agency staff to make this assessment on a case-by-case basis.

Question 2: Alaska is very unique and often requires unique considerations to disseminate information. How will you ensure that rural constituents like mine are kept informed, including on issues like COVID-related scams?

Response:

The FTC should partner with Alaskan authorities at the state and local level to ensure that all of Alaska's communities, including native populations in rural areas, receive the information that they need about consumer protection issues, particularly on COVID-related scams. When the FTC uncovers violations of the law, the agency should require as part of any enforcement action that lawbreakers proactively notify victims and the public about the infractions. If confirmed, I would seek to work with you and your staff to identify other opportunities to equip Alaskans with the information they need.

Question 3: Due to an evolving patchwork of consumer privacy laws being developed in many states around the country, the Committee and Congress have been considering federal privacy legislation. Do you believe that preemption of the ever-increasing patchwork of state privacy laws is necessary for effective federal legislation in this space?

Response:

A national privacy law seems critical. In general, I believe there are important costs to consider when assessing whether to override laws that state legislatures have passed to protect their constituents. That said, the tradeoffs associated with federal preemption of state laws can vary by policy area and, if confirmed, I would seek to better understand any relevant tradeoffs in the privacy context.

Submitted by Senator Mike Lee

Question 1: Ms. Khan, in 2018, when you were a Legal Fellow with Commissioner Rohit Chopra, you worked with him to author a paper on the FTC's Section 5 authority to combat "unfair methods of competition."

- If confirmed, would you advocate for the Commission to conduct a rule to combat "unfair methods of competition"?
- What specific rules would you like to see promulgated using this authority?
- Can you describe any limits or outer boundaries to this potential rulemaking power? Is there anything "out of bounds" for the Commission to take up as a rule?
- How should the FTC use its rulemaking authority to address the issues you and others have identified with large tech platforms?

Response:

Rulemaking is a tool that can enhance predictability, lower enforcement costs, and facilitate greater democratic participation. The paper I co-authored on this topic identified a potential set of criteria to help identify areas where rulemaking might be especially beneficial. The factors identified included: (1) instances where the FTC has a robust record of enforcement activity that has yielded agency learning and expertise; and (2) instances where private litigation is unlikely to discipline or deter anticompetitive conduct.

Any "unfair methods of competition" rulemaking by the Commission would be bound by various legal requirements. For example, a final rule could be promulgated only if a majority of Commissioners voted in favor of it. The rulemaking would also be governed by the Administrative Procedure Act (APA), which requires the agency to publish a notice of proposed rulemaking (NPRM) and to solicit and review public comments before finalizing the rule. Under the APA, the rulemaking would be subject to judicial review under the "arbitrary and capricious" standard, where courts assess whether the agency action reflects reasoned decision-making in light of the evidentiary record. The Congressional Review Act would also apply.

If confirmed, I would look forward to working with my fellow Commissioners and agency staff to identify any other legal requirements and to assess whether this tool could complement the Commission's longstanding reliance on adjudication, as well as how it might apply to digital platforms.

Question 2: During the hearing, we had a brief exchange regarding your views on the use of the FTC's rulemaking power. As a follow up to our conversation, I wanted to ask the following questions:

- I asked whether the FTC should not promulgate rules in the absence of rulemaking power expressly granted by Congress. In response, you noted, "I don't have philosophical view on that." Having had time to reflect, can you explain your view on this matter? Senators who must vote on your nomination and the American public at large should know your views on the rulemaking authority of a commission on which you are nominated to serve.

- Can the FTC use its rulemaking authority to circumvent legal precedents with which it disagrees?
- Should FTC rules insulate market incumbents from competition?
- Can FTC rules have the unintended consequence of insulating market incumbents from competition?
- In your view, is the FTC better positioned to protect consumers when it acts as a regulatory agency or an enforcement agency? Why?

Response:

If confirmed, my work as an FTC commissioner would be governed by relevant legal limits and precedents. In *National Petroleum Refiners Association v. FTC*, the D.C. Circuit unanimously held that Section 6(g) of the FTC Act confers substantive rulemaking authority on the FTC.[1] If the Commission were to encounter subsequent legal challenges to this authority, I would seek analysis from the FTC General Counsel's office.

Any rules promulgated by the FTC would be bound by various legal requirements. If the FTC were to pursue "unfair methods of competition" rulemaking, a final rule could be promulgated only if a majority of Commissioners voted in favor of it. The rulemaking would also be governed by the Administrative Procedure Act (APA), which requires the agency to publish a notice of proposed rulemaking (NPRM) and to solicit and review public comments before finalizing the rule. Under the APA, the rulemaking would be subject to judicial review under the "arbitrary and capricious" standard, where courts assess whether the agency action reflects reasoned decision-making in light of the evidentiary record. The Congressional Review Act would also apply.

If the FTC were to pursue rules to restrict "unfair or deceptive acts or practices" absent additional instructions from Congress, its efforts would be governed by the 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvements Act (Magnuson-Moss). Under Magnuson-Moss, any consumer protection rulemaking must follow various procedural steps that go beyond those required for traditional APA notice-and-comment rulemaking, including the publication of an advanced notice of proposed rulemaking (ANPR), public hearings that permit interested parties to make oral presentations and to provide rebuttals and cross-examine, and providing additional notice to Congress.

Congress granted the FTC authority to pursue its work through both adjudication and rulemaking. While the scholarly literature assessing the tradeoffs between rulemaking and adjudication is extensive, if confirmed I would work with my fellow Commissioners and agency staff to consider which approach would best ensure the FTC is faithfully discharging its statutory obligations.

Question 3: Section 6(b) is used by the FTC to require a company to file "annual or special…. reports or answers in writing to specific questions" about its business practices, conduct,

[1] 482 F.2d 672 (D.C. Cir. 1973). Section 6(g) of the FTC Act states the FTC can "make rules and regulations for the purpose of carrying out" various provisions of the FTC Act. 15 U.S.C. § 46(g).

management, etc. The FTC has used this authority to conduct wide-ranging studies that do not have a specific law enforcement purpose.

- When should Section 6(b) authority be used? Should there be limits to its use?
- The production of documents can be expensive? How would you balance the invocation of the authority with the expense to the business?

Response:

Legislative history suggests that lawmakers vested the FTC with significant information-gathering tools so that the agency could fully grasp and keep up to date with business practices and market realities. To that end, the Commission's Section 6(b) authority could be especially useful in the context of emerging technologies and novel business practices, or when the agency encounters significant information asymmetries and gaps in knowledge that impede its efficacy. I understand that agencies typically rely on a "meet and confer" process to identify ways to reduce costs for market participants subject to any requirements to produce documents. As with any potential Commission effort, the agency should weigh using or not using its Section 6(b) authority against the efficacy of deploying the agency's other tools.

Question 4: Current FTC Commissioners recently appeared before the Senate Commerce Committee and made the joint request that Congress "act to clarify Section 13(b) of the FTC Act and preserve the FTC's ability to enjoin illegal conduct and restore to consumers money they have lost."

- Do you agree with the above statement made by current Commissioners?
- What is your stance on the FTC's authority to use 13(b) to pursue restitution or disgorgement?
- The FTC appears to have more expedited authority under Section 13(b) than Section 19. If Congress considered amending Section 13(b) to ensure that you had the ability to seek monetary penalties, shouldn't the 13(b) process, at a minimum, also have increased procedural protections like those under Section 19?
- There are different views on how to legislate on 13(b), even within the Commission. As Congress considers amending 13(b), how can we properly balance the Commission's consumer protection tools with the due process protections that ought to be awarded to all parties?

Response:

Over the last few decades, the FTC has used Section 13(b) of the FTC Act to secure billions of dollars in relief for victims of unlawful conduct, including anticompetitive pharmaceutical practices, telemarketing fraud, privacy and data security violations, and scams that target seniors and veterans. In *AMG Capital Management v. FTC*, the Supreme Court held that Section 13(b) does not authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution or disgorgement.[2] Absent legislative action overriding this decision, the FTC is legally bound to follow the Supreme Court's ruling.

[2] 141 S.Ct. 1341 (2021).

I believe legislative action is needed and, if confirmed, I would look forward to learning more about the various legislative proposals in Congress and the various perspectives at the Commission.

Question 5: Congress is in the midst of a debate about federal legislation related to data privacy.

- What is your stance on federal data privacy legislation?
- Is preemption a necessary component of this legislation?
- Is a private right of action a necessary component of this legislation?
- In your opinion, should the Commission be granted additional APA rulemaking power to carry out data regulations? And what rules should specifically be promulgated to address this challenge?

Response:

A national privacy law seems critical. In general, I believe there are important costs to consider when assessing whether to override laws that state legislatures have passed to protect their constituents. State attorneys general and private enforcers can also play a critical role in protecting victims of unlawful conduct, especially when federal enforcers are falling short and given finite agency resources. That said, if confirmed I would seek to better understand any relevant tradeoffs associated with pursuing such an approach in the privacy context.

Question 6: In detail, describe your involvement with the investigation, production, and drafting of the house antitrust report. Describe in detail to what extent you: interviewed witnesses; reviewed investigated party documents; formulated the report's conclusions; and drafted the actual report?

Response:

I served as counsel to the House Judiciary Committee from March 2019 through October 2020. During that time, I worked on the Committee's bipartisan investigation into competition in digital markets. As a congressional inquiry, the investigation was initiated to identify any facets of digital markets that invite congressional action, including potential changes to appropriations, heightened oversight, and legislative reform. My work on the investigation included soliciting and reviewing information from certain market participants, briefing Committee members and senior Committee staff on the status of our work, drafting statements and memos for Committee members and senior Committee staff, providing assistance to Committee members ahead of congressional hearings, and assisting in the development of the report.

Question 7: The House report on digital markets that you helped author does not list any Republican staffers. I understand that once the report had been drafted by Democratic staff, Republican staff were only given a brief window of time to review it before it was released to the public. I also hear that the report ignored much of the testimony given by Republican-selected witnesses at the hearings.

- Why wasn't there more bipartisanship in this process?
- Is this how you plan to work with your colleagues at the FTC?

Response:

I am grateful to have had the opportunity to work on the House Judiciary Committee's bipartisan investigation into digital markets. Majority and minority staff worked together closely to solicit information from market participants, gather testimony from relevant experts, and ensure that the Committee was receiving the information needed to conduct its inquiry. A review of the information collected resulted in two reports, one drafted by the majority staff and a "Third Way" report released by Congressman Ken Buck and signed onto by several colleagues.[3] The Third Way report agreed with the findings of the majority staff report and offered additional views on the recommendations, identifying some areas of agreement and some areas of disagreement, and noting the bipartisan nature of the review.[4] If confirmed, I would look forward to working with fellow Commissioners to ensure the FTC is faithfully discharging its statutory obligations.

Question 8: Your predecessor for this seat, Joe Simons, played an integral role in the development of critical loss theory, which has been incorporated in the agencies' Horizontal Merger Guidelines. How will you apply critical loss theory in your review of mergers before the commission, especially mergers involving "free" products?

Response:

When used appropriately, critical loss analysis can be a helpful tool in merger reviews. The FTC should consistently strive to ensure that its tools are analytically rigorous and reflect empirical realities, including through regularly reviewing and refining the theories on which it relies. If confirmed, I would look forward to working with my fellow Commissioners and agency staff to review the various theories included in the Horizontal Merger Guidelines.

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[3] Investigation of Competition in Digital Markets, Majority Staff Report & Recommendations, U.S. House Subcommittee on Antitrust, Commercial and Administrative Law, Committee on the Judiciary (Oct. 2020); The Third Way, Rep. Ken Buck, U.S. House Subcommittee on Antitrust, Commercial, and Administrative Law, Committee on the Judiciary (Oct. 2020) [hereinafter "Third Way Report"].

[4] Third Way Report 2 ("We wish to thank Chairman Cicilline for his collegiality, cooperation, and commitment to conducting a bipartisan and holistic review of Big Tech's anticompetitive market distortions. Since June 2019, the Chairman has delivered on his promise to conduct a bipartisan, top-to-bottom review of the anticompetitive behavior in the technology marketplace."); *id*. at 3 ("The majority staff report offers a comprehensive review of the technology marketplace and accurately depicts the harmful effects of Big Tech's anticompetitive reign over the digital economy."); *id*. at 7 ("[W]e offer our support for many of the legislative recommendations included in the majority staff report and offer our suggestions to find bipartisan agreement on many other suggestions.").

Question 9: One of your potential future colleagues, Acting Chairwoman Rebecca Slaughter, has argued that antitrust can be used as a tool for advancing racial justice. Do you believe that that is an appropriate use of the antitrust laws?

Response:

Empirical research suggests that growing consolidation and the rise of market power has contributed to lower wages, higher prices, and declining rates of new business formation. Communities of color can be the hardest hit by some of these effects. Robust antitrust enforcement can reduce the unlawful exercise of market power and create more opportunities for workers, consumers, and small business owners across the board.

Question 10: In *Amazon's Antitrust Paradox*, you talk about Amazon's "dominance," and you are explicit that your use of dominance is broader than the legal definition (fn 191: "I am using "dominance" to connote that the company controls a significant share of market activity in a sector. I do not mean to attach the legal significance that sometimes attends "dominance.""). When you are deciding to issue a complaint or judging a matter in administrative litigation, will you use the legal definition of monopoly power and not your definition of "dominance"?

Response:

Yes, if confirmed I would seek to ensure that the Commission's legal analysis is informed by the relevant legal definitions.

Question 11: In *Amazon's Antitrust Paradox*, you write, "But in several key ways, Amazon has achieved its position through deeply cutting prices and investing heavily in growing its operations—both at the expense of profits."

- Is it your position that companies should not lower prices and invest in their business?
- How should companies successfully compete?
- Are you concerned that skepticism towards lower prices and investment will actually harm competition, and instead result in sleepy industries controlled by cartels?

Response:

Our antitrust laws identify general principles that seek to distinguish permissible from impermissible forms of competition. I believe any assessment of business practices is best informed by a deep commitment to learning from empirical evidence and understanding market realities. Various factors can inform whether a business practice is viewed as beneficial or harmful. For example, while steps taken by firms to lower prices can often be benign or beneficial, antitrust law holds that practices like price-fixing are generally illegal even if consumers pay a lower price. If confirmed, I would look forward to helping ensure that the FTC's work is founded on a strong understanding of market realities.

Question 12: What facts that might arise during an investigation would cause you to change your mind about the conclusions you draw regarding the alleged dominance and anticompetitive behavior of "big tech" companies, such as Facebook, Amazon, or Google?

Response:

Enforcers should make legal assessments based on a faithful review of the evidentiary record and careful analysis of the relevant legal standards. If confirmed, I would be committed to approaching these issues with analytical rigor and fidelity to empirical evidence.

Requested by Senator Marsha Blackburn

Question 1: If you had been at the FTC during the Obama years, what would you have done differently in the merger review process?

Response:

As a general matter, I would have sought to ensure the Commission was doing a full review and grasping the business realities in a particular market prior to determining the legality of a transaction. For example, while major players in digital markets bought up hundreds of firms during that period, the DOJ and FTC closely examined only a handful of those deals. More broadly, the agency's analysis may have benefited from giving greater weight to network externalities, the self-reinforcing advantages of data, and other factors that can lead markets to tip and thwart new entrants. If confirmed, I would look forward to identifying ways the Commission could learn from missed opportunities and apply any relevant lessons going forward.