Answers to Questions for the Record
Confirmation Hearing of Christine A. Varney
Before the Senate Judiciary Committee
March 10, 2009

Questions from Senator Feingold

1. In July 2008, you published an oped in the *Wall Street Journal* concerning the proposed Arbitration Fairness Act. Have you had a chance to consider further the position you took in that oped, and can you discuss your current thinking about mandatory, binding arbitration provisions in consumer and employment contracts?

Answer: I recognize that arbitration clauses in certain types of agreements - such as employment contracts - can be detrimental to individuals seeking just compensation. While I do believe that arbitration is a long-established, successful method of resolving certain types of smaller-value consumer disputes without having to take your case to court, I believe mandatory, binding arbitration provisions in many types of contracts should be prohibited.

2. I understand that the Federal Trade Commission (FTC) has jurisdiction over mergers and market consolidation for Pharmacy Benefit Managers (PBMs). Given that there are three pharmaceutical firms which solidly dominate the market - often to the detriment of local, community pharmacies - do you anticipate collaborating with the FTC to increase government oversight of PBM mergers and acquisitions during this administration?

Answer: As you note, the Federal Trade Commission has traditionally handled pharmaceutical matters. As an FTC Commissioner, I had the opportunity to weigh in on issues related to Pharmacy Benefit Manager (PBM) integration. I would be happy to work with the FTC on these issues, should they request such.

3. Several constituents continue to express concerns about the recently approved merger between Allied and Republic in the waste management industry. They are concerned that the merger has allowed the creation of a system where there are two dominant firms and there are significant barriers to entry for any independent haulers to challenge either major firm. Do you have particular concerns about duopolies' potential for negative impacts on competition? If so, what actions can and should the Department take in cases such as these?

Answer: I pledged during my confirmation hearing to ensure that the antitrust laws are vigorously enforced. I believe any merger, regardless of the industry, must be reviewed with rigor. If I am confirmed as Assistant Attorney General for Antitrust, you can be assured that careful thought, along with attention to facts, industry dynamics, and economic theory, will be part of any merger analysis. In addition, should a merger have the potential to result in a duopoly, the highest level of scrutiny must be given to such analysis.

4. Also in connection with the Republic / Allied approved merger, the merger agreement included a divestment agreement. There is some concern that the divestment might be accomplished through a package sale and that due to the expense of the combined properties, independent waste companies will have difficulty competing and the only viable bidder may be the other dominant firm of the duopoly. Should this occur, would it undermine the purpose of requiring divestment in these markets?

Answer: As Assistant Attorney General, I will start with the premise that if a merger is anti-competitive, regardless of the industry in which it occurs, it should be enjoined. If only a portion of a merger is anti-competitive and a remedy is available to resolve the competitive concerns, I would, of course, work with the merging parties to create a consent agreement that resolves those concerns, and follow the Tunney Act procedures to ensure public comment on the proposed remedy. In considering any potential remedy, we must ensure that it will not itself create a competitive problem.

5. I understand the proposed merger between Ticketmaster and Live Nation is unlikely to be considered by the Antitrust Division, but I would like your opinion on the proposal given your history as a former FTC Commissioner and your views on vertical integration. Ticketmaster is clearly a dominant firm in ticket sales and especially for certain types and sizes of events. Is the proposed vertical integration a greater concern in this situation than if both firms were in unconcentrated competitive markets? I know that the FTC or DOJ would conduct a more rigorous analysis, but based on the publicly available information, do you think this merger presents serious concerns?

Answer: I believe that vertical integration through mergers or acquisitions can substantially lessen competition. I also believe that the facts and theories of competitive harm for such combination must be reviewed carefully and thoroughly. I understand that the merger of TicketMaster and Live Nation is currently under review by the Antitrust Division. Again, I can assure you that I will not shy away from considering the competitive impact of any merger that results in vertical integration.