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

Questions from Senator Kohl

1(a). Ms. Varney, in the last two years, our Antitrust Subcommittee held two hearings on Google and competition in the internet search and internet advertising sector. Google has grown to become a dominant player in this sector, a sector of vital importance to the economy as a whole. Many industry observers compare Google now to the dominance possessed by Microsoft a decade ago.

Indeed, at a speech to the American Antitrust Institute last June you stated that, that the U.S. economy will "continually see a problem – potentially with Google" because it already "has acquired a monopoly in Internet online advertising."?

With this in mind, how will you scrutinize allegations of anti-competitive behavior by Google in the Internet sector in the future? Do you believe it has the capability to gain a stranglehold over this market?

Answer: If confirmed as Assistant Attorney General for Antitrust, as I stated during my confirmation hearing, you can be assured that I will vigorously enforce the antitrust laws. Where the evidence shows a violation of the antitrust laws, I will prosecute. I am not currently aware of allegations of anticompetitive behavior by Google. But like any other company, if I am made aware of such allegations, I will ensure that the Division thoroughly investigates such.

(b) From time to time, we hear calls that the old rules of antitrust don't apply to the so-called "new economy." Others argue that antitrust principles remain sound, and are flexible enough to take into account conditions in new industries. What's your view? Do new high tech industries such as this one require a different framework of antitrust enforcement? If so, what would that look like?

Answer: I believe we face a diverse set of challenges related to the application of the antitrust laws to high technology industries. I also believe that rapid seismic change has occurred in technology markets primarily because technology companies had the incentive and the freedom to innovate. In other words, innovation is a primary basis of competitive rivalry in technology markets. From my time at the FTC and in private practice, I have considerable experience regarding the application of the antitrust laws to technology industries and the Internet, and I believe the antirust laws are sound and flexible enough to be applied to any industry, including the technology sector. I also believe that when reviewing alleged anticompetitive activities in this area we need to listen to the industry participants, and take into account certain attributes of technology markets, such as network effects, the impact the activity has on innovation, and whether the activity results in foreclosure.

2. Last summer gas prices reached record highs of over $ 4 per gallon and crude oil exceeded $ 140 per barrel. These prices fell sharply in the last few months of 2008, and are now under $ 2 per gallon in many places. These price declines were caused by a sharp decrease in demand caused by the worldwide economic recession. But we shouldn't expect the good news on gas prices to last – since last Fall OPEC has made large oil production cuts totaling nearly 4 million barrels a day with the express purpose of raising oil prices. In the words of OPEC's President referring to these production cutbacks, "The stronger the decision, the faster prices will pick up." And already gas prices have begun to rise again – and are up about 25 cents per gallon since the beginning of the year.

In the last few years, the Justice Department spent an enormous amount of time and effort prosecuting price fixing cartels. Yet the worst and biggest cartel in the world is the OPEC oil cartel, and we've not taken any action against them. That's why I've introduced my NOPEC bill, which would permit antitrust actions by the Justice Department against the OPEC cartel, or any other cartel involving oil, petroleum or natural gas.

Do you agree with me that the actions of OPEC would be illegal if it was a group of private companies? Would you support the Justice Department having the authority to bring antitrust lawsuits against OPEC member nations?

Answer: I am also concerned about gasoline prices and the effect they have on American consumers. If I am confirmed as Assistant Attorney General for Antitrust, I can assure you that the Division will work with the Federal Trade Commission to continue their efforts to uncover and prosecute any anticompetitive conduct in the petroleum industry. While I agree that OPEC is a cartel that inflicts tremendous harm to American consumers and the industry, legislation in this area raises some difficult and complex issues. Suing foreign sovereign entities under the antitrust laws raises a number of sensitive diplomatic and security considerations with implications far beyond antitrust.

3. We have recently been examining in Antitrust Subcommittee cell phone text messaging rates. From 2006 to 2008 the four largest cell phone companies – accounting for over 90% of the market -- doubled their rates on a per-message basis, rising first from 10 to 15, then 15 to 20 cents per message in close proximity to each other. Each of the four companies raised their rates by the identical amount during this period, despite the fact that the per-message cost of text messaging is tiny, estimated at less than one cent per message by some experts.

Consumer advocates allege that this parallel rise in text messaging rates is contrary to what one would expect in a fully competitive market. We have launched an inquiry into this issue in the Antitrust Subcommittee, and last September I wrote a letter to the four CEOs of the cell phone companies for an explanation.

Do you have any views as to what these text messaging rate increases say about competition in the cell phone market? Will you pledge to examine this issue should you be confirmed?

Answer: I have not reviewed this issue, but look forward to working with you and Division staff, if confirmed, to examine it.

4. In September of last year, the Justice Department released a Report on single firm conduct under section 2 of the Sherman Act. This report, if followed, would substantially raise the barriers to bringing actions against companies engaging in monopolistic or anti-competitive practices. The FTC did not join or endorse the Report. Indeed, three of the four sitting FTC Commissioners expressly rejected the Report, stating that it was [QUOTE] "blueprint for radically weakened [antitrust] enforcement . . . that "would make it nearly impossible to prosecute a case under section 2." I was also very disturbed by the conclusions in this Report.

What is your view of the September 2008 DOJ Report? Do you intend to implement its recommendations, or will you agree to reexamine it?

Answer: As I stated during my confirmation hearing, I do not support the conclusions in the Section 2 Report. As I also noted during my confirmation hearing, I have an open mind about what should be done with the Report. On the whole, it represents high-quality, significant work by the Division staff. If I am confirmed, I plan to review the Report with Division staff and engage with the Federal Trade Commission, and then determine what is the best way to move forward on the issues presented.

5. We have heard many concerns from U.S. companies with global operations about being treated unfairly by other nations' antitrust enforcement agencies. These companies assert that complying with conflicting antitrust review processes is very expensive, burdensome and time consuming. They are also concerned with conflicting results among international antitrust authorities, particularly between the European Commission and the United States. There are several prominent recent examples that raise concerns, including Microsoft facing numerous antitrust investigations in Europe, and the EC blocking the GE-Honeywell merger in 2002 after the U.S. Justice Department approved the deal. Complaints have also been raised about unfair treatment given to U.S. companies by foreign antitrust authorities in order to protect competing businesses in the foreign nations. On the other hand, other commentators point out that many American companies seek the assistance of international antitrust authorities to remedy anti-competitive problems in foreign nations.

Do you believe that conflicts with international antitrust enforcement agencies is an important issue for you to address? Should even we strive for harmonization? And, if so, what will you do to achieve greater co-ordination and harmonization between U.S. and foreign antitrust enforcement agencies?

Answer: Yes, I also believe that competition law is a global issue and Antitrust Division should play a significant role in promoting antitrust policy around the world. If confirmed as Assistant Attorney General for Antitrust, I will work to ensure that it does. We must continue our cooperation with worldwide antitrust authorities, discussing our differences with international enforcers respectfully and engaging with emerging antitrust regimes such as China and India as they implement new antitrust laws. I am sure these goals can be achieved. I also plan to participate actively in those international organizations that have traditionally worked to ensure some level of convergence on process and substantive issues, as well as continue the Division's tradition of offering Technical Assistance to countries with emerging antitrust regimes.

6. Since the passage of the Newspaper Preservation Act of 1970, the industry has changed dramatically. Cities and towns that supported multiple papers are now lucky to have one strong newspaper. Only recently, we have seen the closing of the Rocky Mountain News, the Albuquerque Tribune, and the Birmingham Post-Herald. It is even possible that San Francisco could become the first major city without a major daily paper, if the San Francisco Chronicle is forced to close. Despite the number of voices reaching consumers through other media platforms, newspapers remain a vital source of local news and opinion.

Given the state of the newspaper industry, should the DOJ review its policies towards newspaper joint operating agreements (JOAs)? And should the Department's analysis of mergers in the newspaper industry take into account the difficulties being experienced by that industry and the desirability of maintaining at least one daily newspaper to serve large communities?

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. At the same time, I also understand the current plight of American newspapers, the competition they face today, and the effects of the economy on them. In addition, I am familiar with the aims of the Newspaper Preservation Act its idea of maintaining editorial voices. With these aims in mind, if confirmed, I look forward to reviewing these issues with Division staff, with an eye to reaching the right balance on such issues.

7. In 2004, I sponsored an amendment to the Tunney Act, the law which governs the manner in which the courts review government antitrust settlements with the Justice Department. My amendment was enacted into law. This amendment heightened the

scrutiny that courts must give to such settlements. We intended to halt the practice of courts merely "rubber stamping" these settlements, but instead to ensure that the courts scrutinized these consent decrees to ensure that the settlements were in the public interest.

Are you satisfied with the way the Justice Department and the courts have interpreted the 2004 amendment to the Tunney Act? How closely do you believe Justice Department settlements should be scrutinized by the courts? Do you recommend any further amendments to the Tunney Act?

Answer: I have not studied how the Division has handled the 2004 amendment to the Tunney Act, and cannot comment at this point on whether further amendments are needed. I do believe that the public and the courts must have the opportunity to review and comment on proposed Division settlements, and if confirmed, I will work to ensure such, as well as review with Division staff the current interpretations of the Act, as amended.

8. In your written testimony at the hearing, you called for "renewed collaboration between the Antitrust Division and the FTC, whose policies and processes have unfortunately diverged too frequently in recent years." You added that "policy disputes and jurisdictional squabbles between agencies with overlapping enforcement mandates lead to uncertainty for consumers [and] business."

One issue that has led to criticism is the clearance process between the Justice Department and FTC for determining which agency reviews specific mergers and acquisitions under the Hart-Scott-Rodino Act. On occasion, this determination is not made until nearly the end of the initial 30 day waiting period under the Act, causing the agency which ultimately is the one that reviews the transaction to send out an extensive Request for Additional Information and Documents (a "Second Request") because it has not had adequate time to examine the transaction prior to the resolution of the clearance dispute. For this reason, the Antitrust Modernization Commission recommended that "The Federal Trade Commission and the Antitrust Division should develop and implement a new merger clearance agreement . . ., with the goal of clearing all proposed transactions to one agency or the other within a short period of time."

Do you agree with this recommendation? Was this issue one of those "jurisdictional squabbles" you referred to in your testimony? Do have any plans to attempt to improve and/or implement new clearance procedures with your colleagues at the FTC?

Answer: As I indicated during my confirmation hearing, the new Chairman of the FTC and I will work closely on a variety of issues, including the efficiency and transparency of the clearance process. In most cases, a transaction naturally falls under the purview of one agency that has considerable experience in evaluating similar deals. In cases where it is unclear which agency has more relevant expertise, they may conduct a protracted negotiation to determine which agency will handle the investigation. As a private practitioner, I have seen firsthand how these unnecessary delays can postpone the procompetitive benefits of such transactions for consumers. The delay and uncertainty associated with the current process have a variety of costs, including an erosion of the agencies' credibility. I believe as a former FTC Commissioner, I am uniquely positioned to achieve this desired goal.

9. Since 2002, the Antitrust Subcommittee has does an extensive amount of work with respect to obstacles to competition created by hospital group purchasing. When we first examined this issue, we found that many smaller and innovative medical device manufacturers were being blocked from entering the market by exclusionary practices engaged in by hospital group purchasing organizations (GPOs), often at the behest of large, dominant manufacturers. Since that the time, the GPO industry has pledged to voluntary reforms and codes of conduct, and promised to eliminate many of these exclusionary practices. Nonetheless, we still hear from some medical device manufacturers who allege that they are being blocked from entering the hospital supply market because of GPO practices. Will you pledge to examine allegations of antitrust violations by either manufacturers or GPOs that are blocking entry of competitors in medical devices or equipment?

Answer: Yes. I pledged during my confirmation hearing that if I am confirmed, I will ensure that the antitrust laws are vigorously enforced. I look forward to working with you and representatives in the life sciences and healthcare fields to determine whether the antitrust laws have been violated.

10. The Supreme Court declined last month to hear the Federal Trade Commission's appeal of the D.C. Circuit's decision in *Rambus*. In that case, the FTC claimed that Rambus acquired monopoly power by manipulating its industry standard-setting process. The FTC argued that Rambus deceived the standard-setting body its patent holdings, and encouraged the body to set as the industry standard a technology for which it secretly held the patent. This prevented the standard-setting body from assessing the costs and benefits of alternate technologies with full information, and also prevented the body from requiring that Rambus offer licenses on reasonable and nondiscriminatory terms as a precondition for selection of its technology. The FTC alleged that this behavior led to the acquisition of monopoly power, which Rambus exercised when it asserted its patent interests and demanded high royalties from its competitors. The D.C. Circuit found inadequate proof of anticompetitive effects, and the Supreme Court declined the FTC's petition to hear the case. This is of concern to those of us who support stricter policing of the standard-setting world, in order to ensure fair access to the playing field for all competitors. Industry standards are important and necessary, but abuse of patent portfolios in an effort to control those standards cannot be tolerated. If you are confirmed, what steps will you take to police the standard-setting world for anticompetitive behavior?

Answer: I believe that a significant intersection between antitrust and intellectual property is the application of the antitrust laws to standard setting organizations (SSOs).

It is widely recognized that the development of standards can promote competition and economic efficiency by facilitating product interoperability, creating open networks, ensuring public safety and disseminating product information. However, standard setting may harm competition in some cases by thwarting innovation and entrenching older standards when newer or better technology is available. There is a fairly well developed body of case law that applies Section 1 of the Sherman Act, which prohibits agreements in restraint of trade, to industry standard-setting activities. However, the law is less clear when participation in the SSO is allegedly used to gain monopoly power over the standard. As an FTC Commissioner, I helped to bring attention to this issue in public speeches and by participating in Dell Computer Corp., the first case in which an antitrust enforcement agency challenged the misuse of an SSO to gain monopoly power over an industry standard. If confirmed, I hope to bring further clarity to this increasingly important aspect of the antitrust/IP interface.

11. Under current law, the Department of Transportation can approve applications for antitrust immunity for international airline alliances. The Justice Department may comment on these applications but the ultimate decision to approve or disapprove the application rests with the Department of Transportation. What is your view of this arrangement? Do you think it is desirable to have the Department of Transportation possessing this authority, or would it be better for this authority to reside with the Justice Department, the agency with expertise over antitrust law?

<u>Answer</u>: If confirmed as Assistant Attorney General for the Antitrust Division I look forward to learning more about this application process and the Division's role in it. I also look forward to working with you and the Department of Transportation to determine whether the roles, as established, are appropriate.

12(a). In his statement to the American Antitrust Institute last year, President Obama criticized the lack of enforcement against health insurance mergers with over 400 mergers approved with only two enforcement actions. What will be your approach to evaluating mergers among health insurance companies?

(b) Would you be willing to review consummated health insurance mergers and challenge any if there is evidence of competitive harm?

(c) I understand that there have been no antitrust enforcement against enforcement conduct by health insurers in the past 8 years. Does that concern you? What will be your approach to evaluating allegations of anticompetitive conduct by health insurance companies?

<u>Answer</u>: Healthcare is a significant cost driver in our economy today, and President Obama has identified healthcare reform as a top priority. And I believe strongly that maintaining vigorous competition is key to controlling healthcare costs. As has been publicly reported, concentration in health plans has been on the rise. If confirmed, I want to work with the Division staff, who have been studying these issues in real time, to learn

more about the approach they have been taking. I look forward to the Division contributing to the healthcare reform debate in a meaningful way under my leadership, if confirmed, because maintaining and enhancing competition is an essential component of any reform proposal.

13. In 1996 Justice Department/Federal Trade Commission Heath Care Guidelines were issued you said, "[t]he health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance." Now, more than a decade later, do you believe these Guidelines need to be revised, and, if so, how?

Answer: If confirmed, I will consider whether the Health Care Guidelines need to be revised to reflect changes the healthcare and life sciences industry has experienced. However, my general impression is that they were designed to be flexible enough to be used even with the rapidly changing environment.

14. On February 24, our Antitrust Subcommittee held a hearing on the proposed merger between Ticketmaster and Live Nation. We are concerned about that merger because of its potential to compete a dominant, vertically integrated company controlling large portions of the concert business, from venues, to promotion, to artist management, to ticketing. While we recognize you cannot comment on a pending matter, do you promise to ensure that this merger is investigated thoroughly to determine whether or not it may cause a substantially injury to competition? And, more generally, what will be your approach to examining vertical mergers?

Answer: I continue to 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.