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

Questions from Senator Schumer

1. It is my understanding that over the past eight years, the Bush Justice Department challenged very few mergers on account of the anticompetitive effects of vertical integration.

- Is this statement accurate? If so, can you identify how many mergers were challenged on account of vertical issues?
- Do you believe that vertical mergers should be *per se* legal? Why or why not?
- As Assistant Attorney General, what will you do to reverse what appears to be a clear trend away from challenging mergers on the basis of the anticompetitive effects of vertical integration?

Answer: While I understand concerns have been raised regarding the Antitrust Division's past review of mergers, including vertical mergers, I pledged during my confirmation hearing to ensure that the antitrust laws are vigorously enforced. I believe that both horizontal and vertical mergers 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. I can also assure you that I will not shy away from considering whether the vertical integration resulting from a merger or acquisition is likely to substantially lessen competition, which is the standard of review for all mergers under the Clayton Act.

2. On July 17, 1995, you gave remarks on "Vertical Merger Enforcement Challenges at the FTC." In those remarks, you make the statement that "the greater the market share of the companies that are vertically integrating, the greater the probability that downstream customers will be injured." Last month, the Antitrust Subcommittee of this Committee held a hearing on the merger of TicketMaster and Live Nation. That merger features TicketMaster, which is said to hold 80% of the market for ticketing concerts in major venues in the United States, and Live Nation, the world's largest live music company.

- Isn't this exactly the kind of merger that presents the kind of concerns you raised in your speech?
- If not, what would be an example (either hypothetical or actual) of a merger that would present a high probability of harm to downstream customers on account of vertical integration?

Answer: I continue to believe what I said in my 1995 remarks: vertical integration through mergers or acquisitions can substantially lessen competition. I also believe that the facts and theories of competitive harm for such combinations must be reviewed carefully and thoroughly. I understand that the merger of TicketMaster and Live Nation is currently under review by the Antitrust Division, and if I am confirmed as Assistant Attorney General for Antitrust, I look forward to reviewing this matter, as permitted. Again, I can assure you that I will not shy away from considering the competitive impact of any merger that results in vertical integration.

3. In that speech, you also describe Silicon Graphics' plan to acquire two of the three of the world's three leading entertainment graphics software firms. In that case, the FTC challenged the merger on account of concerns about self-favoritism, and the access that the merged firm would have to competitively sensitive information of its rivals.

- Are similar concerns presented by the Ticket Master/Live Nation merger?

Answer: While I understand that the merger of TicketMaster/Live Nation is currently under review by the Antitrust Division, I only have access to information available in the public domain. Therefore, I am not currently in a position to compare the Federal Trade Commission's ("FTC") *Silicon Graphics* matter to it. The *Silicon Graphics* case reviewed during my time as a Commissioner involved the acquisition of two of the world's three leading entertainment graphics software firms by a company that had a 90 percent share of the workstations that run entertainment graphics software. My concern was that Silicon Graphics would use its market power in the workstation market to undermine competition in the software market. I believe the FTC's consent decree solved this problem by requiring Silicon Graphics, among other things, to maintain an open architecture and to publish its application programming interfaces so that new entrants would have the ability to create competitive entertainment graphics software applications. In my view, this is an example of how antitrust enforcement can help maintain a level playing field for emerging technologies.