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

Questions from Senator Specter

1. Of the 400 mergers that have occurred in the health insurance industry in the past 12 years, the Justice Department has imposed conditions in two, United's acquisition of PacifiCare and Aetna's acquisition of Prudential's health insurance subsidiary. Health insurer consolidation has coincided with steadily increasing premiums, even as patient co-pays and deductibles have expanded, effectively shrinking the scope of coverage. In contrast, the FTC has vigorously prosecuted doctors for anticompetitive conduct. If confirmed, what actions will you take to increase the level of scrutiny that DOJ gives proposed health insurance mergers and their impact on the cost of health care?

Answer: Healthcare is a significant cost driver in our economy today, and President Obama has identified healthcare reform as a top priority. I also believe 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.

2. Some health care policy makers have argued that the joint DOJ/FTC Health Care Guidelines are out of step with the current healthcare marketplace, particularly as they relate to clinical integration activities of physicians. Under this Administration, do you envision the Department of Justice being more active in the interpretation and enforcement of the Guidelines?

a. If so, what is your view of the Guidelines as they relate to today's health care marketplace, particularly with regard to the efforts of physicians to adopt health information technology and quality improvement initiatives to improve health care quality?

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, particularly in the rapidly changing healthcare environment.

3. Multiple private suits have been brought alleging that MasterCard and Visa operate as a mechanism through which their member banks agree to charge the same interchange fees, a structure that many have argued amounts to illegal price fixing. Joint decision-making by the banks via MasterCard and Visa has been subject to antitrust

liability in the past. In *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), the Justice Department successfully challenged a rule imposed by both MasterCard and Visa prohibiting their member banks from issuing American Express and Discover credit cards. In characterizing the effect of the rule, the Second Circuit stated that "[e]ach [bank] has agreed not to compete with the others in a manner which the consortium considers harmful to its combined interests. . . . [S]uch arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act." The Second Circuit's characterization would also seem to apply to the manner in which interchange fees are set. If confirmed, will you remain vigilant with respect to possible anticompetitive behavior by MasterCard and Visa, especially with regard to interchange fees? Do you agree with the analysis in *United States v. Visa U.S.A.*?

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 MasterCard and Visa. But like any other company, if I am made aware of such allegations, I will ensure that the Division thoroughly investigates such. In addition, with Division staff, we will determine whether the analysis in Visa U.S.A. is appropriate.

4. American Needle, a company that has produced apparel with NFL team logos for the past 20 years, recently brought suit alleging that the NFL and the owners of its 32 teams violated the antitrust laws by colluding to restrict the output of NFL apparel by entering into an exclusive license with Reebok. The district court dismissed the suit, holding that the NFL was a single entity and therefore exempt from the antitrust laws. Although the majority of circuits have concluded that the NFL is not a single entity, the Seventh Circuit affirmed, concluding that the NFL is a single entity for purposes of promoting football and that selling NFL apparel amounts to promoting football. *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008). American Needle has sought certiorari to resolve the circuit split, but before granting a writ of certiorari, the Supreme Court has asked the Solicitor General to file a brief on the issue. The case could determine whether other joint conduct by the NFL, including the sale of television rights, is subject to the antitrust laws. I have many concerns regarding the conduct of the NFL, particularly with regard to the NFL's decision to broadcast games on pay television, rather than on free broadcast television. The NFL claims that games televised on pay television are also televised on free broadcast television in the hometown television markets of the teams; however, the NFL narrowly defines what constitutes the hometown television market of an NFL team. If confirmed, will you commit to taking a close look at this case, to urging the Solicitor General to take a close look, and to being vigilant with respect to other potentially anticompetitive behavior by the NFL?

Answer: Yes. If confirmed, I will work closely with the Solicitor General and Division staff on this case, as well as any case on which the Supreme Court seeks views on antitrust issues. Also, as indicated during my confirmation hearing and 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.

5. The Railroad Antitrust Enforcement Act, which this Committee recently considered, repeals the express antitrust exemptions enjoyed by the railroads and subjects railroad mergers to review by the antitrust agencies. I support such changes. However, the bill also subjects regulated conduct to suits for injunctive relief brought by private parties and eliminates the doctrine of primary jurisdiction in which courts must defer to regulatory agencies. Without a rollback of regulatory authority exercised by the Surface Transportation Board, I am concerned that the legislation could subject the railroads to conflicting legal obligations. This would be a significant departure from current doctrine, which was articulated most recently by the Supreme Court in *Credit Suisse v. Billing*, whereby the antitrust laws are supposed to give way to congressionally-mandated regulatory regimes. Can you discuss how you think the antitrust laws should interact with congressionally mandated regulatory regimes?

a. Can you discuss how you think the antitrust laws should interact with the regulatory authority exercised by the Surface Transportation Board?

<u>Answer</u>: Antitrust exemptions are not typically favored, although they do exist in certain areas. As I expressed during my confirmation hearing, in certain formerly regulated industries like the railroads, a reexamination of exemptions to determine their impact on competition is wise. I am also aware of the *Credit Suisse* ruling. If I am confirmed as Assistant Attorney General for Antitrust, I will examine these issues to determine what is in the best interest of consumers and maintaining consumer welfare, when balanced against the existence of congressionally mandated regulations in an industry.

6. The Justice Department issued a report last year indicating it intended to reduce enforcement in Section 2 monopolization cases. The report was met with sharp criticism from some quarters, notably several FTC Commissioners, creating the appearance of domestic divergence on enforcement policy. This divergence in opinions is being closely watched internationally. If confirmed, how would you ensure that the U.S. government conveys a unified message internationally on key substantive issues? If you are confirmed, what will you do to improve coordination between the two agencies?

<u>Answer:</u> 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.

7. Members of the antitrust bar have indicated their concern that criminal enforcement within the Antitrust Division sometimes diverges from the Division's overall enforcement policy. Do you believe criminal enforcement should be consistent

with the Division's general enforcement posture? If so, will you commit to ensuring that such consistency exists?

Answer: Yes. I do believe that criminal enforcement of the antitrust laws is critical to maintaining competitive marketplaces and I agree that it should be consistent with the Division's general enforcement posture. If confirmed as Assistant Attorney General for Antitrust, I will ensure that this consistency exists.

8. The Antitrust Modernization Commission recommended that Congress provide a budgetary authorization and corresponding appropriations to address the shortcomings in international technical assistance work currently being conducted by both the Justice Department and the FTC. A predictable and regular source of funding would make it possible to build a long-term strategy of engagement with priority countries. Well-funded international engagement and technical assistance is critical to U.S. competitiveness, as it can help curb the potential for divergence and misuse of competition enforcement against leading U.S. companies. Would you consider pressing for a budget authorization as a means of increased funding for the Department of Justice so it can provide meaningful technical assistance to the world's major competition authorities?

Answer: I 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, and will take any necessary steps to ensure that outcome.

9. While the McCarran-Ferguson Act exempts many insurance company practices from the antitrust laws, it does not exempt acts of boycott, coercion, and intimidation. I am concerned that a number of major life insurance carriers may be engaging in a boycott with respect to secondary market activity. Last Congress, I wrote to the Assistant Attorney General to express concerns about evidence of a possible group boycott by a number of major life insurers. As a former prosecutor, I am keenly aware that the initial gathering of evidence does not constitute a full and thorough investigation; however, the evidence suggested that further investigation was warranted. Would you commit to reviewing the letter I wrote and the evidence mentioned therein?

Answer: Yes. If confirmed, I will review the letter you sent on this issue and will certainly consider the evidence mentioned therein.

10. On December 17th of last year, I joined three other Senators on this Committee, Chairman Leahy, Senator Kohl, and Senator Hatch, in writing a letter to the Attorney General and the Secretary of Transportation regarding concern over further use of DOT's statutory authority, pursuant to 49 U.S.C. § 41308, to grant antitrust immunity to airline joint ventures. Under this statute, DOJ has the opportunity to provide comments regarding such immunity. Since a number of applications for immunity remain pending, if you are confirmed, what steps will the Antitrust Division take to review these types of applications for immunity? Do you believe that an advisory role for DOJ in reviewing these applications is sufficient to protect its interest in making certain that consumers will not be harmed by any proposed immunity?

Answer: 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.

11. Despite numerous decisions to the contrary in the courts, the FTC continues to vigorously prosecute generic and brand drug makers for entering into agreements settling patent infringement litigation in which the generic firm agrees to delay entry. During your testimony before the Committee, you suggested that you might be opposed to any drug patent settlement that included a so-called reverse payment.
To clarify, does that mean that you believe any settlement in which a generic firm receives something of value, or receives a reverse payment—no matter the amount—violates the antitrust laws?

a. If a patent is valid and applicable, then a settlement allowing a generic to enter the market before the expiration of the patent—no matter what the generic manufacturer receives—would actually increase competition. Why should such settlements be unlawful? Why should patent holders not enjoy the presumption that their patent is valid until there is some evidence that it is not?

b. If not all settlements in which a generic firm receives something of value violate the antitrust laws, might the court in the underlying infringement case be in the best position to assess the potential anticompetitive affect of a settlement?

c. Do you believe it is appropriate for a government agency to continue litigating an issue when every circuit court to address the issue has rejected the agency's argument?

Answer: While the Federal Trade Commission has primary jurisdiction over the pharmaceutical industry, I am very concerned that certain reverse payment settlements, which slow the entry of generics drugs into the market, can negatively impact consumer choices and costs. Regardless of which position you take on these particular patent settlement cases, I think it is important for the antitrust agencies to speak with one voice on this issue. To that end, if confirmed, I pledge to work with the FTC to more closely align the agencies on this matter and develop a unified approach to dealing with reverse payment settlements.

12. Since 1997, you have worked as a partner at the law firm Hogan & Hartson on privacy and antitrust matters. Your clients have included eBay, DoubleClick (the largest internet advertising firm), *The Washington Post*, *Newsweek*, Dow Jones & Co., AOL and Compaq. If confirmed, how will you handle recusal issues should these or any other clients have matters being investigated by the Justice Department?

Answer:

If confirmed, in the event of a potential conflict of interest, of this or any other kind, I would consult with the Office of Government Ethics and the Department of Justice's designated agency ethics official and comply with their guidance.