The American Antitrust Institute

Public and Private: Are the Boundaries in Transition?

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TRANSCRIPT

Contents

Welcome and Introduction

Bert Foer

Welcome to the Eleventh Annual Conference.

My name is Bert Foer. I'm the president of the American Antitrust Institute.

The AAI is an independent nonprofit research, education and advocacy organization that believes that antitrust is not only a good thing, but an essential tool of really any economy that wants to strike a balance between heavy-handed regulation by government, and the heavy hand of corporations operating in a laissez-faire free market style.

I'm going to return to this thought in just a minute. Let me make some logistical statements, and then I'll tell you about our topic for the day and how we intend to approach this topic.

We want to thank the sponsor of our continental breakfast this morning, which is the global government affairs consulting firm FIPRA. And representing FIPRA on our advisory board is Phil Evans from the UK; and thank you Phil.

We want to thank the various organizations that purchased tables for today's events. The sponsors are listed under the supporters' tab in your materials. It's those organizations that really make this type of a meeting possible.

I want to thank the Oregon Law Review which is going to publish the papers that are generated by today's event.

And finally, thanks to all of you for joining us today. We really can't do this without the great support we have in the antitrust community.

Now, let's get back to what I said about antitrust as striking a balance between government regulation and laissez faire. Another way to say this is that there is on the one hand the public sector, represented by government, and on the other hand, the private sector represented by individuals – by families, by commercial units and by associations. Our concern as experts in antitrust and competition policy is in the nuances of the relationship between what is at any point in time public, and private.

The relationship may be viewed in many ways, but as a starting point let's try to focus on who exercises the dominant influence on decisions affecting economic behavior. In a state-led economy, the state by definition has the upper hand - at least in certain spheres. In a laissez-faire economy, the private sector has the upper hand in most spheres. And by upper hand, I suppose I mean to indicate whether it's the state or the private actor who has the greatest discretionary power with respect to particular kinds of economic decisions.

Now the balance between the public and the private has never been static. It's probably never been clear, but certainly not static. You look at China or India where the State has, in our own lifetimes, yielded considerable new leeway to the private side; and it hasn't been static in the US, where the New Deal framework yielded to a deregulatory Chicago-driven model.

The balance between public and private can change as a result of an election, or as knowledge and ideologies change, or as technology opens up new possibilities, or closes possibilities. Or as popular trust shifts toward or away from government bureaucrats or business leaders. And notice that I said "spheres" in the plural, because influence may shift toward the state in some sectors and in some respects, while it shifts toward the private sector in others. It may also shift from one part of the government, such as the state or municipality, to another, such as the federal government - with practical implications for the private sector.

Today, we're moving beyond a narrow focus on economics, in recognition that antitrust is part of a political economy. And we ask the question: Are the boundaries between public and private in transition. And if it is in transition, how do you describe it? Where is it going?

Our hypothesis is that the relationship between government and the private sector *is* in a significant state of transition, and that this affects the dynamics of competition in specific industries and sectors, and many current events questions come directly to mind. Does health care reform mean that 17% of the economy is being taken over by the federal government – are we being socialized? Does governmental response to the banking meltdown mean that the state will play a larger role in the financial services sector? Do job stimulation and other federal programs responsive to the economic crisis mean that government intervention in private markets is necessarily expanding?

Does the Supreme Court's recent rulings on antitrust issues mean that antitrust will not apply as widely to regulated sectors? And will this increase or decrease public intervention in the economy? Does the Obama administration's antitrust rhetoric mean that the laissez-faire semi-libertarian philosophy that dominated so much of the past 30 years, has now been put out to pasture? And finally, does a perceived crisis in climate warming and energy production – including our ability to cap a leak deep beneath the ocean surface – does this mean that the government's role in the energy sector will inevitably become more powerful?

It may be helpful to read to you an excerpt from an analysis on Page 1 of the June 19th New York Times, by David Sanger, and I quote:

"Mr. Obama reinvigorated a debate about the renewed reach of government power, or alternatively the power of government overreach. To Mr. Obama, this is all about rebalancing the books after two decades in which multinationals sometimes acted like mini-states beyond government reach, abetted by a faith in markets that, as Mr. Obama put it at Carnegie Mellon University a few weeks ago, 'gutted regulations and put industry insiders in charge of industry oversight'. When Representative Joe L. Barton, the Texas Republican, opened hearings of an unconstitutional shake-down of BP to create a slush fund, he was giving voice to an alterative narrative: a bubbling certainty in corporate suites that Mr. Obama, whenever faced with crisis that involves private-sector players, reveals himself to be viscerally anti-business. The reality, not surprisingly, is more complex".

Now today, I think our job is to identify some of these complexities: to look at diverse dots and see whether they can be connected in a coherent way. Our focus of course will be on issues that relate to competition. But competition takes place within a framework: a framework established and maintained by government, and influenced by the overall political context and culture. If normative understandings about what ought to be private and what ought to be public are changing, then we should expect that this will have an effect on competition policy. And many of the issues that we're going to be laying out and hearing about today, could have been delivered in a time-tested conversation about antitrust and regulation, exemptions, immunities and state action. Others are deviations from standard antitrust discourse. The amount of change that is in the air suggests that if we are pouring old wine, it should be into new bottles. And in fact, we believe that some of the wine we are going to pour today will be new, and that a broader view of competition policy will be especially helpful at this time.

The Assistant Attorney General of the United States, Christine Varney, will start the day, sharing her views on the rise of a more flexible approach in antitrust law and policy, and the absence of a continuing need for certain traditional antitrust exemptions in this contemporary era.

Now here is how I would relate this topic to the day's question: if antitrust represents one form of state intervention, an exemption from antitrust may represent a high degree of freedom from state oversight: unless the exemption responds to an enhanced framework of more direct government regulation. So we're going to learn from Assistant Attorney General Varney how she views the elimination of exemptions as an expression of the public's influence on business decisions.

And it's now my great pleasure to introduce former FTC Commissioner, former partner at Hogan & Hartson, an experienced counselor with special expertise in high technology, who has shared her expertise with this audience previously when she was on the private side of the ledger: this is the Honorable Assistant Attorney General, Christine Varney.

[Applause]

Keynote Address

Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Thank you, Bert.

I just said to Bert – those are very, very big questions. Send me the transcripts so I know the answers when you're done with your meeting! Because I'm going to speak about something much narrower, and perhaps one of the bricks upon which you can build your discussion.

It's great to be back here at the American Antitrust Institute. You have been a tremendous supporter of antitrust through the ages, and as Bert knows, very important to me personally in my thinking and the development of my views of antitrust.

I also want to point out I'm joined by two of my deputies this morning - Carl Shapiro, who is our chief economist, and if any of the economists have questions afterwards, I'm going to turn them over to Carl. And Sharis Pozen, who is our chief of staff at the Antitrust Division.

As Bert alluded to, in today's world, our dynamic and rapidly changing global economy demands an antitrust regime grounded in economic analysis that is responsive to market realities. As Bob Pitofsky observed a few months ago when he accepted the Sherman Award, the movement towards more responsive substantive antitrust rules over the past few decades is a welcome progression. This is true whether one is a Chicago School adherent, or one believes, in the words of Pitofsky's recent book, that the Chicago School "overshot the mark".

The evolution of antitrust analysis and enforcement should cause us to examine the state of exceptions from the law. With the benefits of free market competition and market-oriented antitrust analysis flowing to businesses and consumers around the world, one must reconsider the validity of the underlying rationale for current exemptions, and think carefully before creating new ones.

Antitrust law and policy, and the markets in which they operate, have changed dramatically over several decades. In the 1950s and 60s, we saw a period of growing industrialization and concentration in the American economy – a tide that was met with what has come to be viewed as over-enforcement of the antitrust laws. To be sure, big was sometimes condemned as bad, without

a consistent grounding in economic analysis or proof of anticompetitive market effects; and insignificant mergers were routinely blocked under a *per se* standard. The excesses of this period were brought to heel by the ascendancy of the Chicago School.

While the Chicago School introduced a level of much needed rigor into antitrust analysis, the belief that government intervention in the market does more harm than good, and that left unfettered the market will best protect competition and consumer welfare has, I believe, been discredited. I think many would agree that the days of excessive antitrust intervention are behind us, thanks in part to the Chicago School, and this is a good thing.

But antitrust enforcement is now in need of some reinvigoration. The pendulum swing begun in the 1970s and propelled by the Chicago School's belief in the supremacy of markets has gone too far in the direction of skepticism about enforcement, and reliance on the markets' abilities to self-correct.

Yet returning the pendulum to the center does not mean a return to the bad old days, when Justice Stewart observed in his dissent in *Vons Grocery*, "The sole consistency I can find is that in litigation under section, the government always wins".

To the contrary: it is precisely because I have faith in the foundation of antitrust law and the economic presumptions behind it, that leads me to believe vigorous enforcement ensures that a healthy and competitive market can thrive. Modern market-oriented antitrust analysis is a powerful tool for the promotion of consumer welfare, because it is attuned to market realities, recognizes real efficiencies, and is exacting in evaluating the economic evidence of the conduct or transaction at issue. When calibrated in this way, antitrust enforcement preserves the competitive environment that requires firms to innovate in both product offerings and business models in order to prosper. And yet, by being more responsive to the facts of particular market transactions and conduct, it also recognizes the efficiencies that may derive from different arrangements. Modern antitrust law protects our markets - not from big companies and not from competitor collaboration, but from inefficient consolidation and anticompetitive conduct.

With that in mind, let me turn to one concrete example of the way antitrust law and policy have changed over the past decades to embrace a more market-oriented and efficiency-minded approach: cooperative efforts by competitors.

Both the courts and the agencies have acknowledged that cooperation among competitors can produce substantial efficiencies, including product and service offerings that would be unavailable without coordination among otherwise competitive firms. That means much collaboration – horizontal and vertical – merits flexible treatment under the rule of reason.

This outlook is evident in landmark cases such as *BMI, Northwest Wholesale Stationers*, and *NCAA*. It also infuses our guidelines on competitor collaborations. In business review letters, speeches and amicus filings, the Division has stood behind its commitment to approach collaborations with the care and analytical vigor necessary to accommodate the many innovative arrangements that are bringing greater efficiency and untold possibilities to our dynamic economy.

Businesses can test the acceptability of their arrangements or strategies without implementing them and risking prosecution. Business review letters provide a transparent opportunity to present models and ideas to the agencies for consideration before deploying them. We will engage in a dialogue with the sponsors of a proposal under review. We will discuss any concerns we have, and how a proposal could be modified to alleviate our concerns. Our commitment to supporting pro-competitive collaborations among competitors is evident in our recent Associated Press business review letter. The AP proposed a plan to establish a voluntary news registry that would allow various news organizations to pull their content for licensing in a single forum. Those seeking to republish the content could turn to this registry as a central clearing house. Although this plan brings together various competing news providers, the Division concluded that it was unlikely to harm competition and could simultaneously – as we said in our letter – provide a new, efficient mechanism through which content users can identify applicable terms of use, and purchase licenses for news content. Accordingly, we support the news registry as proposed, and are anxious to see whether this system can bring greater efficiency to news content licensing.

The point needn't be belabored. Antitrust law has moved well beyond the era of blindly condemning collaborative practices that may be efficient, and can accommodate a wide variety of necessary or pro-competitive business arrangements. We remain vigilant in our efforts to condemn arrangements that ultimately constitute unnecessary price fixing, and continue to condemn them as *per se* illegal. Yet in the modern era of antitrust, almost all collaborations are subject to a nuanced analysis, that acknowledges, in the words of our Guidelines, it is competitive forces that are driving firms to complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.

No exemptions are needed to see that such collaborations often are not only benign but pro-competitive.

To put it plainly, the complaint that antitrust law is frequently too rigid to accommodate efficiency-enhancing business behavior has been overtaken by events. The reality is that efficient behavior is ultimately beneficial for fair and free markets, and is consistent with the aims of antitrust. Antitrust law and enforcement policy has the ability to prevent anticompetitive behavior without stifling the kinds of innovative, precompetitive business behavior that keeps our dynamic economy moving and growing while promoting consumer welfare.

Sweeping antitrust exemptions can in fact stifle innovation, thwart increases in output, and reward complacent incumbents. Let me give you one example of an exemption that I believe it is time to retire: The exemption for the business of insurance in the McCarran-Ferguson Act has not promoted innovation or lowered price in the health insurance industry.

McCarran immunity historically relied upon two premises.

The first was that pervasive state law regulation of insurance would be preempted by the Sherman Act in the absence of an antitrust exemption. That is why McCarran exempts the business of insurance *only* to the extent that it is regulated by state law. McCarran immunity was in large part a

response to the Supreme Court's holding in *South-Eastern Underwriters* that the insurance business was within Congress's commerce power; and so raised the specter that antitrust would preempt state regulation and taxation of insurance. Then, the state action doctrine first announced in *Parker v Brown* was only in its infancy. Today, however, that doctrine has been comprehensively developed, and it is now clear that rather than being preempted by antitrust, state law can bestow immunity with a clearly articulated, affirmatively expressed intention to displace competition when coupled with active state oversight. Pervasive and well-supervised state regulation of insurance is thus compatible with the federal antitrust laws under *Parker*. This overlap makes McCarran immunity for the purpose of allowing state regulation unnecessary at best.

The reality can be worse than redundancy. Under McCarran, state regulation, however limited or inadequate, can be enough to confer antitrust immunity. In the words of one leading treatise, the presence of minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve immunity. However, the Supreme Court has made clear that *Parker* immunity requires affirmative government action demonstrating the intent to displace competition, and active government supervision.

Unlike the situation in other industries, consumers of health insurance in many states do not get the benefits of the *Parker* standard.

Second, McCarran was enacted because of the concern that antitrust laws would condemn cooperative rate-making efforts, information sharing and other joint activities designed to improve the functioning of the insurance system. Yet the application of antitrust laws to efficiency-enhancing joint ventures has become much more flexible, favorable and predictable. The result is that pro-competitive cooperative activities are merely a theoretical concern in the absence of McCarran immunity. The American Bar Association, the Antitrust Modernization Committee, and leading scholars all agree: in the words of the same leading treatise, many perhaps most of the challenged practices need no immunity because they do not violate the antitrust laws.

There is a certain irony to McCarran: there is some conduct that is clearly detrimental to consumers that would not satisfy a rule of reason challenge, but is nonetheless immunized by McCarran. For example, agreements to fix prices or reduce coverage across providers are clearly the business of insurance, and so can be held immune by the courts. On the other hand, it is the truly efficiency-enhancing agreements that are not covered by the exemption and thus may face a rule of reason analysis. For example, peer-review agreements, provider agreements and the like may be considered outside the "business" of insurance. The result is a situation in which it is easier to simply agree to price-fix, than it is to exchange real-time clinical information that could lead to much greater efficiencies.

In light of what the doctrine would permit without McCarran, the exemption does a serious measure of harm with rather little offsetting good. The better scheme would be to allow health insurers to rely on *Parker* immunity where appropriate, and to otherwise justify their arrangements as good for competition: just as every other industry does. This is the approach we have advocated and we continue to endorse today. I am hopeful that Congressional action on this front will continue to

move forward. Bills to repeal the McCarran exemption for health insurance are advancing with the support of the Obama administration and of private groups like the American Antitrust Institute. I urge you to keep up your efforts on this front, so that sooner rather than later the benefits of full antitrust enforcement will be introduced to the health insurance industry.

Let me close with a few thoughts about where we are today on antitrust exemptions.

First, new legislative exemptions for specific industries should be avoided. With the economic downturn, some industries have argued that their continued strength or even existence depends upon an exemption from the antitrust laws. Yet in the age of sophisticated economic analysis and market-oriented antitrust enforcement, courts are unlikely to condemn any arrangement necessary to bring desirable products to the market. If innovative arrangements can create genuine welfare for consumers, there is likely to be a way of structuring them consistent with the antitrust laws, and the Division is willing to help find in the effort to do that. Bids for sweeping legislative exemptions are unlikely to reflect a genuine need to circumvent antitrust in order to enhance consumer welfare, and may instead reflect an effort to maintain profit margins in declining industries. Legislators should not support such efforts, especially where the industry cannot demonstrate that consumer welfare is best protected by abandoning antitrust enforcement.

Second, when new exemptions are considered or existing exemptions are going to be redesigned, there are better and worse ways to go about it. The 2004 Standards Development Organization Advancement Act provides a useful framework for encouraging pro-competitive collaboration by eliminating *per se* liability and treble damages for standard-setting activities. The statute protects the standard setting body, not anticompetitive conduct by individual members; and rather than eliminating antitrust liability, it mandates a rule of reason review, and limits successful claimants to single damages. In some important respects, this exemption may not be necessary: standard-setting produces substantial efficiencies and should be examined under the rule of reason if challenged. However, if an exemption must be considered, this is a wiser and safer way of limiting antitrust liability for activity that may push the edges of permissible conduct or undertakings. Such narrow and tailored exemptions that preserve some level of enforcement but limit liability are a better model than sweeping and overbroad exemptions that authorize even hardcore price-fixing and output restrictions.

Finally, exemptions for regulated industries, whether in statute or judicial precedent, should be narrowly construed. Antitrust and regulation are complements, not substitutes. Indeed, regulators and antitrust enforcers should be empowered to the greatest extent possible to work together in regulated industries to bring the benefits of competition to an ever-growing set of markets and their consumers. If we can do so, we can harness the creativity and responsiveness of the modern era in antitrust law by making the law of exemptions equally responsive to market realities and consumer welfare. With this, then, we have the capacity to bring real benefits to the American economy.

And I'd love to take some questions.

[Applause]

Question & Answer Session

Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Steve Ross, Penn State University Dickinson School of Law: I can't think of a single word I disagreed with. There is one major industry consisting of competitor collaborations where nuanced antitrust law would [inaudible] exactly the way you described it but that the Justice Department has not brought a suit in, in 57 years: and that is the sports industry. [Laughter] Specifically, just to pick one example, the last lawsuit held under an incredibly sophisticated rule of reason approach despite the fact it was 1953, was that most [inaudible] broadcast arrangements were not efficient, not necessary, and were illegal. [Inaudible] football, which is now governed by the Sports Broadcasting Act, yet every other league [inaudible]. I'm wondering if you would be willing to consider asking the [inaudible] to take a serious look at various aspects of specifically broadcasting, entry and all these other areas of the sports industry which are of direct concern to millions of Americans and affect consumer welfare certainly in a non-monetized sense far more than quite frankly in many industries in which you're doing good work. And to take a serious reconsideration of whether this is an appropriate area for you to spend some resources.

AAG Varney: Well let me start by saying that every time I'm in a roomful of men, I always get a sports question. [Laughter]. And every time I'm in a room full of economists, we get the same question because there's so much money at stake in the broadcasting rights you're talking about. We know it's a huge industry. We clearly are interested in the industry of sports. I think those of you who read our filing in the recent *American Needle* case saw that we were quite interested in the allocation of economic power, and the applicability of the antitrust laws to the arrangements at hand there, and I was thrilled to see the Supreme Court in its first decision since I've been the Assistant Attorney General on an antitrust matter, adopt wholesale the government's position. So, let me start by saying that as an industry it's certainly something we are keenly aware of. We've dipped our toe in the water with great success, I think, with our first amicus filing. And we continue across many industries, not simply sports. I mean, there are other industries in the economy – the health insurance being one – that there is a *significant* amount of resource at stake and affects millions and millions of Americans every day. I'm not going to comment on whether we're going to undertake specific investigations or not, other than to say: we are aware of what I think of are the most critical areas of the economy. We are aware of the consolidation in some of those areas. We are aware of the economic concentration that occurs in some industries, and we devote what I believe are appropriate resources to ongoing examinations of conduct and transactions in those industries.

Peter Carstensen, University of Wisconsin: There are a series of workshops on agricultural competition policy, instrumental in creating [inaudible] Wisconsin. What I'd like to know, because I keep getting this question from reporters, is what substantively can we expect to come out of these workshops?

AAG Varney: I get that question a lot too, Peter. The answer is that we've approached this with a completely open mind. As you know, when I was going through confirmation, virtually every senator on the Judiciary Committee asked me to look into agriculture because of the increasing, again, consolidation; and the difficulty experienced by the American farming community. So we have gone, as Peter has referenced, around the country. I went to Vermont with Senator Leahy and Senator Sanders on a Judiciary Committee field hearing on dairy. I went to upstate New York with Senator Schumer on a field hearing on dairy. And this afternoon, we're going to Wisconsin for a dairy hearing as part of the agricultural workshops. We've also been to Normal, Alabama, where we examined the poultry industry, and we were in Iowa where we examined seed and grain.

I have no agenda other than to learn what's going on in these industries. As we come out of these hearings, which are going to conclude I believe in December with a workshop here and a hearing here in Washington on margins. I think I'll see where it takes us. I'm learning new facts at every single workshop. I was just as I've said in Normal, and I didn't know, for example, that live poultry has about a 50 mile radius that it can travel successfully before it has to be processed. That results in very tight geographic markets. There is a lot that goes on when you have a geographic market that is that small with a few number of integrators. So, factually, I'm learning new things every day through these workshops, and I expect to be able to continue to learn, and I'm looking forward to, after we're out in Wisconsin, we're going on to Colorado and looking at packers and ranchers and the red meat industry as they call it. So, no agenda, continuing to learn. Stay tuned.

Warren Grimes, Southwestern Law School in Los Angeles: Commissioner Thomas Rosch at the FTC has offered some interesting views about comparative advantages of the FTC in merger cases. You have the unique perspective of having been both there and now at the Division, and I was wondering if you'd like to comment on that.

AAG Varney: Well, Commissioner Rosch is always full of provocative and interesting ideas. I think what you're referring to is in an article where Commissioner Rosch mentioned that perhaps merger cases should all be tried in front of the Federal Trade Commission's administrative law judges. I can tell you with certainty that the Obama administration does not support a diminution in the power of Article 3 courts, so we will continue to try our merger cases in Article 3 courts, which I think are perfectly up to the job.

John Simpson, Consumer Watchdog: I've been interested in the high-tech sector, and have reached the conclusion that there are some businesses that tend naturally toward monopoly, specifically internet search, which is a vital to consumer interest and a virtual monopoly. I wonder what we can do about that. The internet search engine is clearly a gateway to the internet, but where one company dominates that, is that something we should be concerned about - that a matter of antitrust or a matter of necessary regulation?

AAG Varney: Well, we're quite familiar with the search industry as you know. Prior to my arrival, the Division reviewed the potential Google-Yahoo arrangement, and declared that they would prosecute it if it should go forward, and it was abandoned. We reviewed the Microsoft-Yahoo arrangement and permitted it to go forward, so we're very familiar with industry. But let me say

generally that in this country, we reward innovation, we reward success; but we also require compliance with the laws. And should a company be fortunate enough to gain market share through innovation and superior product offerings, they have an obligation to adhere to the standards laid down by the Supreme Court for those that are in that position. So if you go back to *Aspen Skiing*, you go back to *Lorain Journal*, you look at *Microsoft* on the Court of Appeals case, I think you can clearly see what antitrust requires of those who enjoy a market share, and we have no reason to believe that that is not perfectly adequate to watch across any industry any company that enjoys a legally acquired market power. So we're aware of what's going on in search, and as I've said we remain vigilant across all industries to ensure that the laws are adhered to.

Ed Black, Computer & Communications Industry Association: [Most of question inaudible, but about interface of intellectual property and antitrust].

AAG Varney: I think you may know, we recently joined with the Patent and Trademark Office and the Federal Trade Commission over at the Department of Commerce for a daylong beginning look at the intersection of innovation, competition and intellectual property. The White House has established an office that is leading an administration-wide review and consideration of these issues, and I think we're right at the front end of it, so I don't think anyone is prepared to say where this is going to go, other than we're committed to protecting competition, innovation and intellectual property rights in a highly networked world. And we're not quite sure where that is ultimately going to take us; I think we've all got an open mind. Dave Kappos as you know is the new PTO Commissioner, is very conversant with these issues, and I think he'll provide great leadership as we figure out how we thread this needle in this technology-driven era.

Larry Mirel, Wiley Rein LLP: Before working at Wiley Rein, I served for seven years as Commissioner of Insurance, Securities and Banking for the District of Columbia. You raised the McCarran exemption in the context of health insurance. We have a session later on this morning on it. Some don't think that health insurance is really insurance at all, at least not in a classic sense. Does your [inaudible] also extend to other types of insurance?

AAG Varney: Well, the Obama administration hasn't taken a position on the repeal of McCarran other than for health insurance. We are concerned at the moment with health insurance, and that is where we'd like to see the exemption removed.

Name inaudible: As I'm sure you're aware, recent cases like *Trinko* and *Credit Suisse* have at least implied that courts need not pay much attention to antitrust, or at least section 2, where you have regulatory agencies, if for no other reason that the courts doing so might be a waste of resources, and that the courts might be less specialized. It is readily apparent to anybody who looks at the situation that the agencies sometimes very loosely apply antitrust standards both substantively and procedurally in terms of bringing antitrust issues to the fore. Has the Justice Department considered this situation - either mechanisms where plaintiffs, for example, who file in court and of cases held in abeyance to see what regulatory agencies do, or, in other ways, push doctrine - that if the regulatory agencies are responsible for antitrust and assuming that antitrust is important, that the regulatory agencies actually do it, both substantively and procedurally? [sic; verbatim]

AAG Varney: Let me take that on a couple of levels. The first thing that we are actively doing at the Division, is working extremely closely with our sister agencies. We work with the Securities and Exchange Commission, with the Federal Energy Regulatory Commission, we work with the Department of Transportation, to name just a few. We work with the FCC very closely. So we are interested in making sure that the agencies that regulate sectors really understand the theory behind competition and the law that supports antitrust. So we are affirmatively out in our sister agencies working with them, detailing people to work on matters, having people getting waivers from parties when there are matters that have to be reviewed by both agencies, as permitted by law. So the first thing we're doing is trying to work very closely with set agencies. The second thing that I am personally trying to do is look for the appropriate opportunities for the Division and the Department to weigh in on those cases that may be moving through the courts and attempt to limit *Trinko* and *Credit Suisse* to the unique facts presented in those cases. I can't tell you how encouraged I was by the *American Needle* opinion. I think there is room on the court for a renewed consideration of the role of government enforcement in antitrust to achieve competitive markets. So it's one of the things that I would very much like to do during my tenure, is make sure, as I've said in my remarks, that regulation and competition are not viewed as substitutes or as exclusive domains. They really are complements, and the entire government needs to work together to ensure that consumer welfare is being promoted, and one of the ways you do that is by not simply abandoning competition in the face of regulation. So we're working on it; we're happy to take ideas from thought leaders like you on how we might do it. You mentioned an interesting proposal at the beginning and we'll certainly take a look at that.

Tom Wenning, National Grocers Association: If I could follow up on that line of thought. The Conference Committee on Financial Regulatory Reform is going to be finishing their work today, probably. Where do you see antitrust interfacing with that financial regulatory reform?

AAG Varney: We're in a really critical moment on the Conference and I'm not going to speak to it. That's being run out of the White House and the Treasury Department and I'd rather let those representatives speak to it. I know that the Congress and the Administration are committed to antitrust enforcement, and that's really all I'm comfortable saying, given, as you point out, we're at a critical juncture.

Bert Foer: A follow-on question: The European Union's Competition Directorate was enormously involved, because of their state aid jurisdiction, in the restructuring of banks, in the dealing with bailouts and so forth. Obviously we don't have a similar role for anybody. But can you tell us, to what extent the Administration or yourself or others were at the table and involved both during the immediate bailout decisions, and in the aftermath? Because here we are again, too big to fail has become a big issue – another topic, by the way, in one of our breakout sessions. I'd like to hear what role competition played at the table during this crisis.

AAG Varney: Sure. Well I'm obviously not going to disclose what happens inside the councils of government, who's at the table and who's at what meetings. I think it's sufficient to say as you see in all of the activity that has come out of the first year and a half of the Obama administration, I think there's no lack of evidence of the administrations' commitment to competition policy. It is a

widely held commitment, and we are routinely involved in conversations at all levels across the government, with our sister agencies and inside the administration on how best to promote consumer welfare and competition policy and antitrust law is, in my view, extremely well represented across the government, sometimes too well represented because we get lots of requests for meetings and participation; so we're there, and we're happy to be there.

Barak Richman, Duke University: On the matter of health insurance and health services, the Massachusetts Attorney General recently issued a report which gathered a lot of really valuable [inaudible] pricing information and contracting practices of insurers and hospitals and other providers in Massachusetts. Is the Division thinking of doing some similar research, or disclosing some other pressing information using subpoena power, looking at other health markets?

AAG Varney: As you know, we don't disclose information we get pursuant to subpoena because it's confidential, but we did recently do a review of the health insurance industry, and as a matter of fact I gave a speech on it about three weeks ago and it's up on our website, and we took a pretty comprehensive look at consolidation in insurance markets, and obviously validated the view that there is a lot of concentration, and looked at the reasons why, and looked at the barriers to entry. We are pretty active in health insurance markets, and we're active again across the councils of government as we're thinking about the new ACOs and how they get structured. We would never release information from a particular investigation but we have a couple of investigations; I don't believe they're public, so I probably can't disclose them that may result in litigation, so I'd stay tuned here. There was one attempted acquisition by Blue Cross Blue Shield in Lansing, Michigan which we announced we would challenge, and they abandoned the transaction rather than have us challenge it. I haven't looked at the Massachusetts study, but I would like to see it.

Spencer Weber Waller, Loyola University Chicago School of Law: I know you are getting toward the finish line with the revisions of the horizontal merger guidelines. I'm wondering if there are any additional areas where you would foresee new initiatives to either create or revise guidelines; if I could put in my personal pitch, in the international area, where so much has changed since the mid-90s since the last time they were [inaudible].

AAG Varney: I want to get these [guidelines] birthed before we think about what we do next. Everybody has their favorite area that they want to see the next guidelines. Some people want to see intellectual property, some people want to see health care, some people want to see international, vertical, you name it; there's all kinds of areas. We'll see – we'll see when we get these out, we'll see what our resource capacity is, we'll see what else is going on in the Division. We're considering; we'd welcome your comments if there are areas that you think are in need of significant work, we'd be happy to take a look at it as we think about it.

Steve Salop, Georgetown University Law Center: I was wondering whether you were going to try to repeal *Credit Suisse* and *Trinko* legislatively.

AAG Varney: I would like to do what I can to make sure that those cases are held to the facts of those cases. I haven't raised the idea of looking at legislation anywhere, so let's see where we go.

Tim [Last name and question inaudible]

AAG Varney: Again, being a good lawyer here and not disclosing what we are counseling our clients: we are very aware that we believe we want to make sure there is no lock-in that occurs as this evolves, and we're are thinking creatively about ways that you can ensure that there's competition and open market place, and we don't worsen any existing consolidation. And we are open to hearing from you all strategies that you think might help with that.

Phil Nelson, Economists Incorporated: You have a lot on your plate, and there's some sources of revenues like merger filings that may be down. And the question is, do you have resource concerns given the budget issues that may be looming in the not-too-distant future?

AAG Varney: Not at the moment. OK.

Bert Foer: Let me ask a final question. I get a lot of calls from the press, and they say, well, what difference has the Obama administration made in antitrust, and is it really different? And I say, the rhetoric is a lot better, and the appointments are terrific. I believe both of those. And then I say, but we haven't seen a whole lot yet. It takes time, there's a long curve to get things through, and there wasn't a whole lot left over from the administration before, so keep watching, it's too soon to judge. But that clock is ticking. So what would you tell this group? What are your three or four proudest achievements so far, and if there are any hints of coming attractions that you can let loose?

AAG Varney: What have we done so far, if you kind of look back at the past year and a half. Well we started out, I was there ten days and we issued the Section 2 report. I think that had a profound effect. I think businesses realized that we were going to be clear, predictable and fair, but we were going to enforce existing precedent. We've had a number of transactions that we were prepared to go to court. My view was to the parties, you choose: this transaction is not legal, we will go to court to block it, or you can fix it. We had one transaction where there was a relatively small part of an overall very large deal, where essentially I felt the parties were arguing to me because the overlap that we were concerned about was so small, we would let the deal go through, and I explained to them very politely that there was no *de minimus* exception, and that we will sue if you don't fix it, and they ultimately did. As I've said, Blue Cross/Blue Shield was abandoned. We've sued on Dean Foods. I think that whether or not you want to categorize it as a change, what I'm interested in is making sure that there is transparency, predictability and stability. So I think what I'm seeing as businesses are coming in the door - they get it! I'm not getting deals that I'm going to have to sue on. What I'm getting in is companies coming in, saying, we'd like to do this deal, here's the merger agreement, and I think Ticketmaster is a good example. As I've said before, we were prepared to go to court. They came back three times until I was satisfied that the result we got through their settlement was the appropriate result for consumers consistent with the antitrust law. So I think that I will forgo comparisons and listing proudest achievements other than to say, I think we've had an active year and a half. We haven't brought a Section 2 case, and we will when the time comes that we find there are appropriate facts and circumstances to take an action. I don't feel compelled to be the AAG who did "X". What I feel compelled to do is make sure that we continue to assist antitrust law and doctrine moving back to the middle, establishing clear, predictable rules for businesses that

promote consumer welfare in an increasingly global and interconnected world. That's a big enough challenge for me, and that's what I hope to be able to do.

Bert Foer: It's a huge challenge, and we're very pleased to have you at the head. This is a great opportunity we've just had to explore the world of antitrust activities, and we're grateful to you.

AAG Varney: OK, great. Thanks very much. Thanks.

[Applause]