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The American Antitrust Institute

Date: December 15, 2008

To: Obama-Biden Transition Project for the Department of Justice

From: Bert Foer, President

Re: Priorities for DOJ Antitrust Division

1. Our 413-page book, *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President* (available at www.antitrustinstitute.org) contains detailed recommendations as well as background information and analysis. A side-by-side comparison of our recommendations with the Antitrust Modernization Commission's and the ABA Antitrust Section's is also available on our website.
2. The Antitrust Division during the Bush Administration has done a creditable job of fighting cartels, particularly international cartels, which has been its highest and seemingly only priority. It has been lax on merger enforcement, oblivious to abuse in vertical relationships, and has become a cheerleader for monopoly. The recent report on Section 2 of the Sherman Act should be withdrawn immediately. Turning the Division from a champion of laissez faire to a more aggressive enforcement agency should be a high priority of the new Administration.
3. On the personnel side, the next AAG should not only be technically qualified but also receptive to a post-Chicago view of economics and not be heavily influenced by having spent a career defending the nation's largest corporations against antitrust enforcement. Deputies should have views generally consistent with the AAG. Key economic advisors must be capable economists who are not limited to Chicago parameters. In general, staff is underpaid and special efforts should be made, as outlined in our Report, to bring the salaries of both lawyers and economists closer to the market. We also make recommendations for enhancing the career opportunities of staff. An early pronouncement by the AAG, supported by the AG, should be a declaration of independence from political interference with investigations and cases.
4. Although there will be budget constraints during the coming period, the Division deserves significant increases, which should come on a pre-planned annual basis. We emphasize the need for long-term planning, which should include the FTC and States as well. There should be adequate funding to assess the impact of past enforcement and non-enforcement decisions. Clearance problems should be ironed out between the Division and the FTC.
5. The Division and the SG have consistently sided with defendants in the Department's amicus program; a more balanced perspective is imperative. We



applaud the attention given to the International Competition Network. Movement toward soft convergence should remain a high priority. The Division has sometimes been inappropriately shrill in its criticism of the EU, whose thinking on antitrust has often been more enlightened than that of the US, and should be viewed as an important resource for the Division. The Division should be supportive of private enforcement in the US and its introduction into other jurisdictions. We encourage efforts of the Division to cabin the expansion of intellectual property rights at the expense of competition. In our Report, we make many specific recommendations relating to cartel enforcement, emerging issues relating to buyer power, and the media, health care, energy, and food sectors.

6. The Division should take a more aggressive approach to mergers, issuing a larger percentage of second requests and paying more attention to levels of concentration that leave no more than four or five significant competitors. Vertical and other theories of potential harm should be given more attention.
7. Decisions of the Division to seek preliminary injunctions should be given deference by the courts, without necessarily combining preliminary and final hearings as is now the custom. If the standard for a preliminary injunction is to be harmonized as between the Division and the FTC, the more deferential FTC standard should be adopted.
8. Legislative priorities should include reforming the handling of RPM in light of the *Leegin* case. There may also be need to focus on a response to the Supreme Court's new expansive regulatory immunity doctrine as reflected in *Trinko*, *Credit Suisse* (and perhaps to come, *linkLine*).
9. While there has been some progress in both public education and transparency, both should continue to receive higher priority.
10. It appears that the nation is about to go through a redefining of capitalism in the face of rapid consolidation and new governmental undertakings, especially in the financial service sector. There is likely to be pressure for protectionism and even cartelization, as occurred in the Great Depression. The Division should be positioned at the center of discussions on subjects like "what does it mean to be too big to fail?" and "how will we deal with the new consolidation?" It is important that we not accept in silence the idea that the changes occurring under pressure of economic crisis will be permanent. Once the crisis has been dealt with, a process (such as the TNEC under FDR) will be needed to take stock and develop a new consensus on appropriate policies and regulatory regimes.