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The American  
Antitrust Institute

Date: December 5, 2008

To: Obama-Biden Transition Project for the Federal Trade Commission

From: Bert Foer, President

Re: Priorities for FTC

1. Our 413-page book, *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44<sup>th</sup> President* (available at [www.antitrustinstitute.org](http://www.antitrustinstitute.org)) contains detailed recommendations as well as background information and analysis.
2. The FTC has been well-led during the Bush administration. The current Commissioners are of unusually high quality. Morale is fairly high and the Commission has been intelligently active on both the consumer protection and antitrust fronts. We can only comment in detail on antitrust, where our major complaint is the extent to which ideological (read: Chicago School) blinders have sometimes limited the scope of interventions and remedies. Unlike the Antitrust Division, there is no need for dramatic or immediate change. A more progressive Commission should emerge incrementally.
3. On the personnel side, the tradition of appointing highly qualified Commissioners should be followed. The next Chair 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. The Bureau of Economics, in particular, must be staffed at its highest levels with capable economists who are not committed 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.
4. Although there will be budget constraints during the coming period, the FTC deserves increases, which should come on a pre-planned annual basis, as set forth in the Dorgan bill. We emphasize the need for long-term planning, which should include the DOJ and States as well.
5. Section 5 of The FTC Act should be interpreted with increasing latitude. The Commission should be applauded for its recent efforts to do this. Section 5's potential role as a bridge to the way the rest of the world looks at abuse of dominance should be explored (as should other initiatives seeking to enhance training and decision-making within the international antitrust community). Commissioners should especially be encouraged to continue their exploration of bundled rebates, standards setting problems, reverse payments in the generic drug area, and development of the law at the intersection between



intellectual property rights and antitrust policy to strike a more thoughtful and innovation-enhancing balance between these two regimes. In our Report, we make many specific recommendations relating to the media, health care, energy, and food sectors.

6. The Commission 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. The administrative adjudication process should be revitalized. There should not be a movement toward a single approach based on the DOJ model. Rather the historic specially legislated independent commission model should be utilized to its fullest.
8. Section 5 should be used to develop appropriate ways to analyze and contain the growing phenomenon of abusive buyer power.
9. The FTC should take a lead in developing a structured rule of reason approach wherever per se illegality does not apply, with a special need for reforming the handling of RPM in light of the *Leegin* case. Indeed, the consumer harm caused by *Leegin* is sufficiently great to warrant proposing legislative reform as part of an overall stimulus/bailout package.
10. While there has been progress in both public education and transparency, both should continue to receive higher priority.
11. Sectoral and neutrally-based impact evaluation studies should be utilized more often to provide the basis for policy and for enforcement initiatives.
12. 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. The FTC 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.