



February 10, 2012

The Honorable Dave Camp, Chairman  
Committee on Ways and Means  
U.S. House of Representatives  
1102 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Max Baucus, Chairman  
Committee on Finance  
U.S. Senate  
219 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Camp and Chairman Baucus:

The American Antitrust Institute (AAI) writes to express our support for the passage of spectrum policy legislation.<sup>1</sup> The proposed extension of the payroll tax legislation currently in the House makes inroads in authorizing the Federal Communications Commission (FCC) to conduct incentive auctions to repurpose existing spectrum.<sup>2</sup> However, the AAI is concerned that some provisions of the bill will hamper the ability of the FCC to ensure that incentive auctions promote competitive and efficient outcomes. In raising this concern, the AAI joins numerous other voices, including members of Congress, leading auction economists, members of the telecommunications industry, and public interest groups. Legislated constraints and carve-outs designed to anticipate market developments, that reflect the interests of certain stakeholder groups, or promote narrow objectives such as revenue maximization, impede the functioning of market-based auctions. These impediments will injure the industry, consumers, and innovation.

Skyrocketing demand for spectrum makes incentive auctions a high priority issue. Analysts predict mobile broadband traffic will increase 35-fold over the next five years, resulting in demand outstripping the supply of licensed spectrum.<sup>3</sup> Increasing demand for unlicensed spectrum is driving innovative uses and technologies such as Super Wi-Fi to

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<sup>1</sup> The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors, which alone has approved this letter. For more information, see [www.antitrustinstitute.org](http://www.antitrustinstitute.org). AAI has analyzed and commented extensively on telecommunications issues and recently opposed the merger of AT&T and T-Mobile, which, after the U.S. Department of Justice and several states challenged it, was abandoned.

<sup>2</sup> Middle Class Tax Relief and Job Creation Act of 2011, H.R. 3630, 112th Cong., 1st Sess. (2012), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630ih/pdf/BILLS-112hr3630ih.pdf> (last visited February 10, 2012).

<sup>3</sup> Federal Communications Commission, "Incentive Auctions," *available at* <http://www.fcc.gov/topic/incentive-auctions> (last visited February 10, 2012).

accommodate growing wireless tablet use and IP traffic. The annual benefits associated with unlicensed spectrum applications over the next decade and half are estimated at close to \$40 billion.<sup>4</sup> It is clear that spectrum allocation decisions require the balancing of licensed versus unlicensed spectrum priorities and objectives. But as currently written, the proposed legislation takes unlicensed spectrum out of the mix, by prohibiting the FCC from designating additional spectrum for unlicensed use.

Incentive auctions have the potential to create significant benefits, including the reallocation of spectrum to its highest valued uses, innovation, and the sharing of auction proceeds between licensees and the U.S. Treasury. The FCC estimates, for example, that an incentive auction market value of \$30 billion would translate to consumer benefits of \$300 billion.<sup>5</sup> It is clear that the benefits of spectrum incentive auctions can be realized only if the sector regulator has the flexibility to design them in ways that will maximize economic benefits. Indeed, the FCC has both the expertise and success in designing the auctions of *new* spectrum that have delivered the benefits of competition and efficiency since the early 1990s. But the proposed legislation prohibits the FCC from imposing conditions on which entities can purchase spectrum licenses in new incentive auctions.

The AAI is particularly concerned that legislated constraints on the FCC's ability to design incentive auctions – leaving less room for the agency to learn, change, and adapt – could undermine their potential benefits. The creation or entrenchment of a dominant firm in spectrum or collusion between bidders causes economic harm to the country. That harm could equal or exceed the revenues that the government may receive from an auction. For example, a firm with market power may overpay for assets, on the assumption that it will recover the overpayment at the expense of consumers later on. Moreover, a firm with market power may wish to acquire assets for purpose of keeping them out of its rivals' hands. It may wish to “warehouse” the assets and not deploy them, or it may deploy them more slowly than it would in a competitive environment.

These are risks that should be taken into account in a meaningful way as Congress considers the FCC's authority involving incentive auctions. While it is crucial that the FCC continue to have power under its public interest standard to review spectrum acquisitions for their potential to be anticompetitive, we note that it is far easier to prevent concentration from reaching dangerous levels before, rather than after, a transaction occurs. We also believe that the FCC should have enough flexibility to set rules designed to insure that spectrum is rapidly deployed and that it is not acquired by anticompetitive means, or for anticompetitive reasons.

Repurposing existing spectrum through market-based mechanisms such as incentive auctions is the most efficient way to reallocate existing spectrum. Moreover, vesting the

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<sup>4</sup> Senator John Kerry “Getting Spectrum Reform Right is Crucial for Our Future,” Press Release, *available at* <http://kerry.senate.gov/press/release/?id=f8fa7081-62e8-42aa-a8d9-836cfae8d35d> (last visited February 10, 2012).

<sup>5</sup> *Supra* note 3.

FCC – as the expert regulatory institution – with the flexibility to design incentive auctions is a critical component of achieving spectrum reallocation goals that promote competitive and efficient outcomes. Congress has the opportunity to pass legislation that gets these important parameters “right” from the beginning. The AAI encourages Congress to ensure that the legislation authorizing incentive auctions contains the framework necessary to enable the FCC to fulfill its important statutory mission.

Sincerely,



Albert Foer, President



Diana Moss, Vice President

Cc:

Julius Genachowski, Chairman, Federal Communications Commission  
Lawrence E. Strickling, Assistant Secretary for Communications and Information,  
National Telecommunications Information Administration  
Jonathan Leibowitz, Chairman, Federal Trade Commission  
Sharis Pozen, Acting Assistant Attorney General, U.S. Department of Justice,  
Antitrust Division