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JUSTICE DEPARTMENT AND FEDERAL TRADE COMMISSION REVIEW DATA FROM PAST MERGER ENFORCEMENT CASES

Marks First Time Agencies Will Formally Release Data Collected on Past Horizontal Merger Enforcement Efforts

WASHINGTON, D.C. – R. Hewitt Pate, Assistant Attorney General in charge of the Department’s Antitrust Division, today unveiled a joint Department of Justice and Federal Trade Commission initiative concerning the review of data from each agency’s respective horizontal-merger enforcement cases. The data, which is expected to be made public in December 2003, will look at each agency’s merger enforcement cases over the past five years. The goal of the initiative is to make merger decisions more transparent and to offer insight to the business and legal communities, and others about the agencies’ merger enforcement efforts.

Pate announced the joint effort during his speech at the Annual Fall Forum of the American Bar Association’s Section of Antitrust Law in Washington, D.C., on behalf of both agencies.

“Tim and I are confident that the data we release will prove highly informative to both agencies, as well as to foreign antitrust enforcement officials, industry regulators, and antitrust practitioners--who can better counsel their clients using these data,” said Pate referring to Timothy J. Muris, Chairman of the Federal Trade Commission. “Our goal is to learn from the past to inform the future. By doing so we hope to make our merger enforcement decisions more

transparent, and give the business community, the bar, regulatory agencies, and others better information about our merger enforcement efforts.”

Describing the details of the joint project, Pate said, “The data to be released will focus on the level of the post-merger Herfindahl-Hirschman Index (HHI) of market concentration and the change in the HHI level for mergers to which the Department or the Commission indicated opposition in a public way.” In addition, Pate stated that neither the Department nor the Federal Trade Commission was aware of “past efforts by either agency to examine how its actual enforcement compares to the HHI standards in the Horizontal Merger Guidelines.”

The joint project was undertaken for the agencies’ internal use as well as to inform members of the public who are not specialists in U.S. antitrust law. “Specialists know that the agencies base their enforcement decisions on case-by-case analysis of competitive effects and do not necessarily challenge mergers just because the merging firms have large shares of a concentrated market. But the audience for the Horizontal Merger Guidelines includes the business community and regulatory agencies both in the United States and abroad. And our merger enforcement policies should to the extent possible be transparent to this broader audience as well,” said Pate.

After describing the joint effort and planned data release, Pate said that the prospects for subsequent releases of additional data were unclear. “These issues are difficult, and I am not sure that additional data will be as easily developed by the agencies or be suitable for public release. In addition, the scope and format of additional data from each agency may not be the same.”

About two months after the agencies' initial release of data in December, further joint DOJ/FTC public workshops, including panelists of practitioners, economists, and academics, to provide feedback, are planned.

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