

**Department of Justice  
Antitrust Division**

*Background Information on the 2006 Amendments  
to the Merger Review Process Initiative*

**Introduction**

Today the Antitrust Division is announcing amendments to its 2001 Merger Review Process Initiative.

In the five years since its launch the Initiative has increased the efficiency of the Division's merger investigations, including a reduction in the length of merger reviews. However, as the Division and the courts have grown to rely more on analyses of the likely competitive effects of transactions and less on market share presumptions, both the quality and quantity of information the Division requires to review a merger have increased. Also, advances in technology have made it easier and cheaper for companies to create and maintain vast amounts of electronic documents and information, which has led to a significant increase in the amount of material a company must collect, review and produce during a merger investigation. Today's amendments are part of the Division's ongoing effort to reduce merger review burdens while preserving its ability to conduct thorough investigations and successfully challenge anticompetitive transactions. Many of the changes announced today formally adopt second request modifications and merger investigation procedures already successfully used by Antitrust Division staff.

The most significant of these amendments is the new "Process & Timing Agreement" merger review option. Under this option, companies will generally be able to limit document searches required by a Division "second request" to certain central files and a targeted list of 30 employees whose files must be searched for responsive documents. This option will be made available to companies that provide certain critical information to the Division early in the investigation, agree to an investigation schedule, and agree to a sufficient period for the Division to conduct post-complaint discovery should the investigation become one of the few that result in contested litigation.

The Division has also modified its Model Second Request to reduce document search and production burdens further. These changes include a significantly shorter

default search period, significant limitations on when second request recipients must conduct a “second sweep” for responsive documents, and an alternative to the requirement that companies search back-up tapes for responsive electronic documents. The new Model will be the basis for second requests issued by the Division, regardless of whether parties take advantage of the Merger Review Process Initiative’s “Process & Timing Agreement” option.

Merger review process reforms are a long-standing and ongoing project at the Antitrust Division. The Division will continue to seek ways to reduce enforcement burdens on parties while preserving its ability to fulfill its statutory obligation to prevent the consummation of anticompetitive transactions.

#### **Merger Enforcement at the Antitrust Division – Clayton Act § 7A**

Merger enforcement is a priority for the Division. Mergers may generate efficiencies that can benefit the market and consumers, and the vast majority of transactions reported to the federal antitrust enforcement agencies each year are either competitively neutral or beneficial. However, anticompetitive transactions that “substantially . . . lessen competition, or . . . tend to create a monopoly”<sup>1</sup> can cause significant harm to consumers and to the market, in the form of higher prices, decreased consumer choice, and less innovation. The goal of effective and efficient merger enforcement is to separate those few transactions that are likely to create or increase market power and harm consumer welfare from the vast majority of transactions that are unlikely to reduce competition substantially, and to get out of the way of the latter as quickly as possible.

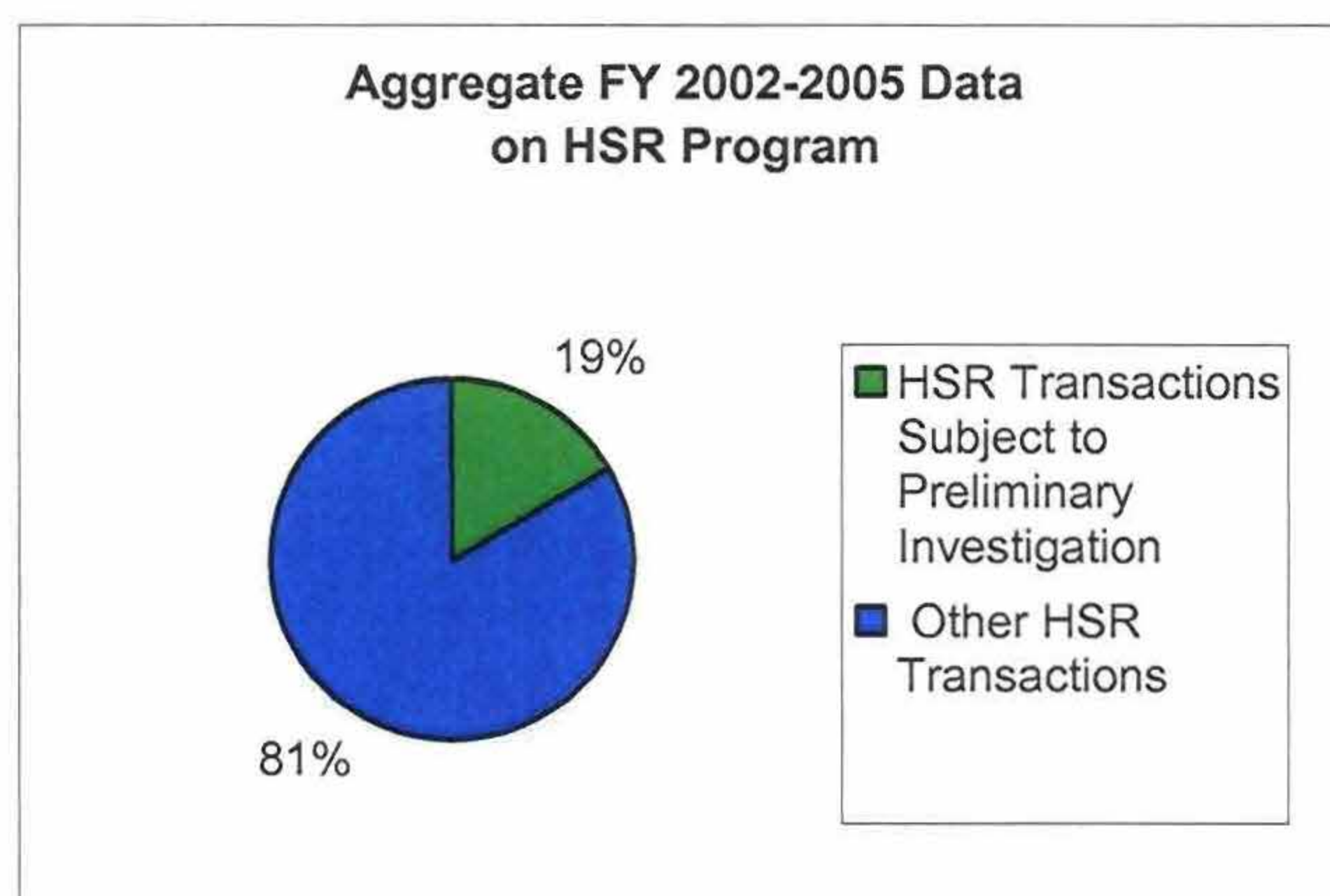
Most mergers reviewed by the federal antitrust enforcement agencies – the Antitrust Division of the Department of Justice and the Federal Trade Commission – are reviewed pursuant to section 7A of the Clayton Act, also known as the Hart-Scott-Rodino

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<sup>1</sup> 15 U.S.C. § 18.

Antitrust Improvements Act of 1976, or simply the HSR Act.<sup>2</sup> The HSR Act requires parties to transactions that meet certain thresholds to file premerger notifications with the Division and the FTC, and to observe an initial waiting period prior to consummating their deals.

Most HSR premerger notifications do not lead to an antitrust investigation. For example, 2,979 of the 3,655 transactions reported during the fiscal years 2002-2005 proceeded without either the FTC or the Division opening an investigation, meaning that 81 percent of the time no information was sought from the parties beyond that which was included in their initial HSR filings.



Moreover, in transactions for which no investigation is opened, the Agencies routinely grant requests for early termination of the waiting period. In FY 2005, for example, the agencies granted approximately 76 percent of requests for early termination.

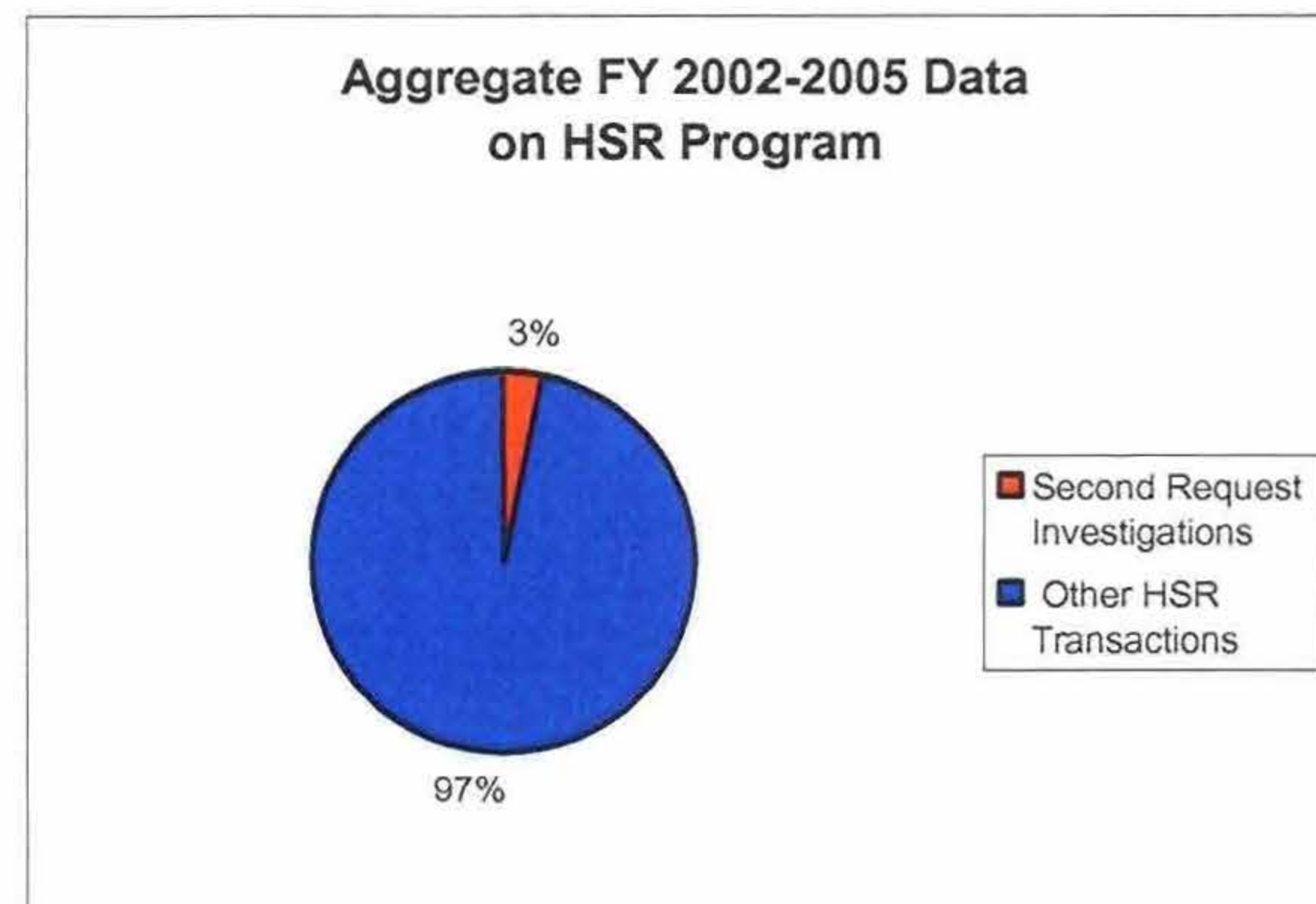
The Division opens a preliminary investigation if there is reason to believe that a transaction may raise competition issues. If at the conclusion of the HSR waiting period the Division has not yet determined that the transaction will not result in a substantial lessening of competition in violation of section 7 of the Clayton Act, it may extend the waiting period and issue a request for additional information and documentary material, also known as a "second request," pursuant to 15 U.S.C. § 18a(e)(1)(A).

The Division does not issue second requests lightly. During the years 2000-2005, for example, the Division issued second requests in 180 of its 555 preliminary

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<sup>2</sup> 15 U.S.C. § 18a.

investigations, or 32 percent of its investigations. Approximately 97 percent of HSR reported transactions were able to proceed with no second request.



During the second request phase, the Division continues and broadens the investigation begun during the initial waiting period by continuing to collect information from the parties and third parties, including the parties' competitors and customers, by interviewing market participants, and by conducting detailed economic and econometric analyses. Second request investigations involve the review and production of substantial amounts of documents and information, in both hard-copy and electronic form, about the proposed transaction, the parties' operations, product or service overlaps between the parties, and the markets in which the parties compete. The Division uses this information to analyze the transaction and the affected markets, to evaluate the likelihood of anticompetitive effects, and, in the relatively few investigations that result in contested litigation, to prepare for trial and try the case.

In the 30 years since it was enacted, the HSR Act and the premerger review process has proven to be an effective means of protecting consumers from anticompetitive mergers.<sup>3</sup> Before the HSR Act, relatively few mergers were challenged before they were consummated. The FTC and the Antitrust Division had difficulty detecting, investigating, and challenging anticompetitive mergers before they occurred. In the absence of preliminary relief, merger litigation was lengthy, and because

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<sup>3</sup> A summary can be found in William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825 (1997).

compliance with post-consummation remedies often required the merged firm to “unscramble the eggs,” remedies were often unwieldy, late in coming, and ineffective. Today, in contrast, the large majority of Division and FTC merger challenges occur premerger, when effective injunctive relief is available, structural relief is more practical and effective, and harm to consumers has not yet occurred.

In addition to protecting consumers from anticompetitive mergers, premerger review has provided a high degree of certainty to merging parties. Although a decision not to challenge an HSR-reported transaction prior to consummation does not preclude the agencies from subsequently challenging it,<sup>4</sup> such challenges are extremely rare. Thus, parties get a high degree of certainty at the end of the HSR process as to whether they will face an enforcement challenge.

### **The Division’s Merger Review Process Initiative**

In 2001 the Division implemented the Merger Review Process Initiative, which was designed to facilitate more efficient and focused investigative discovery and to provide for an effective process for the evaluation of evidence.<sup>5</sup> Through the Initiative the Division seeks to enable staff to identify critical legal, factual and economic issues regarding proposed transactions more quickly and deploy its resources more effectively. Staff is encouraged to use the initial HSR waiting period aggressively to identify and close matters that do not warrant further investigation; to tailor second requests as narrowly as possible; to negotiate reasonable limitations to second requests after they are issued; to consult with the parties regularly; and where appropriate to negotiate scheduling agreements.

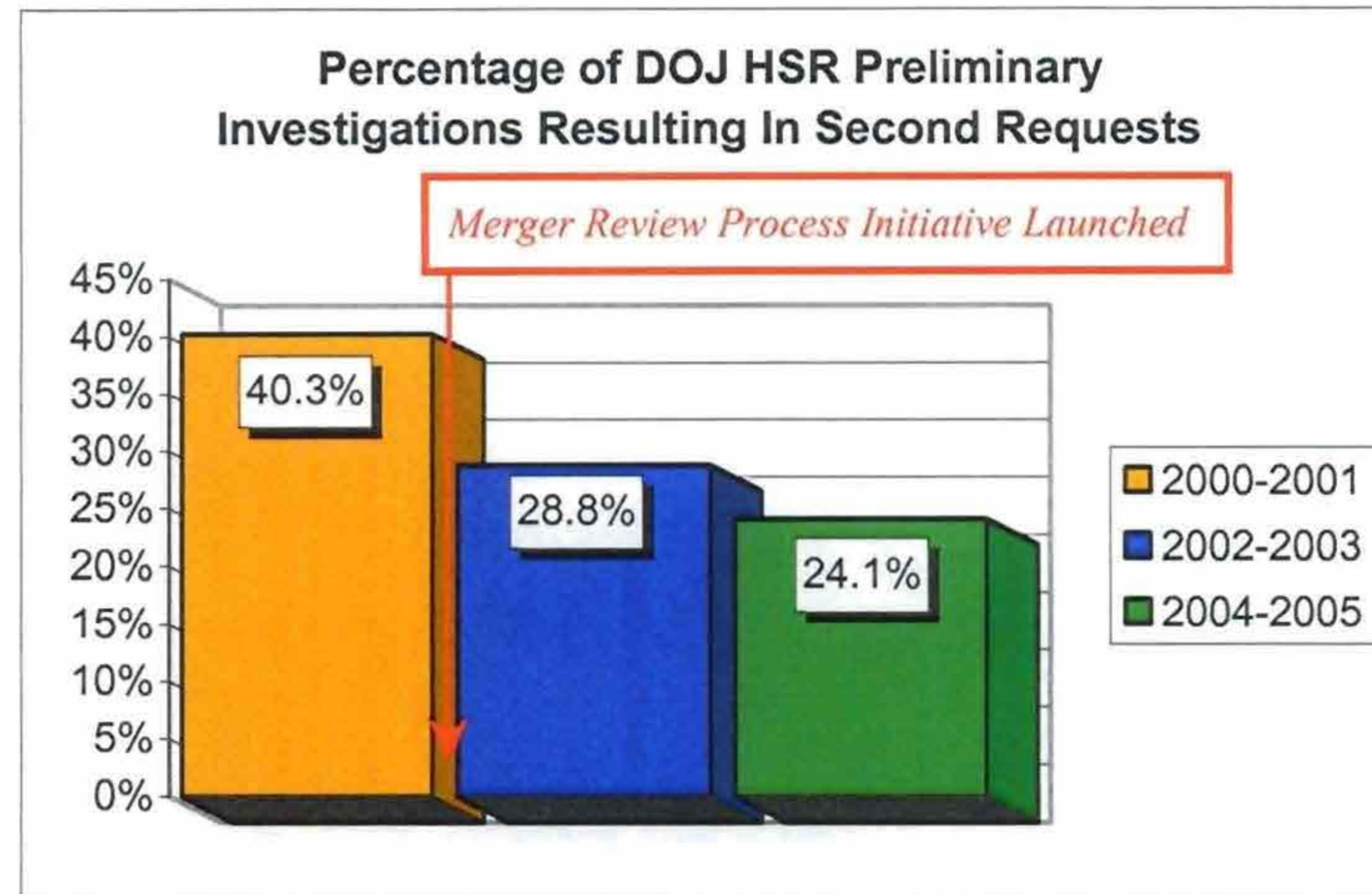
The Initiative has been a success. During the two fiscal years (2000-2001) before the initiative was announced, approximately 40 percent of the Division’s HSR preliminary investigations led to second requests. During a comparable period after the initiative was launched (fiscal years 2002 and 2003), just under 29 percent of the

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<sup>4</sup> See 15 U.S.C. 18a(i)(1).

<sup>5</sup> See *Antitrust Division Releases Details of Merger Review Process Initiative*, available at [http://www.usdoj.gov/atr/public/press\\_releases/2001/9305.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9305.htm).

Division's HSR preliminary investigations went into the second request phase, and in fiscal years 2004-2005 only 24 percent of investigations resulted in the issuance of second requests.

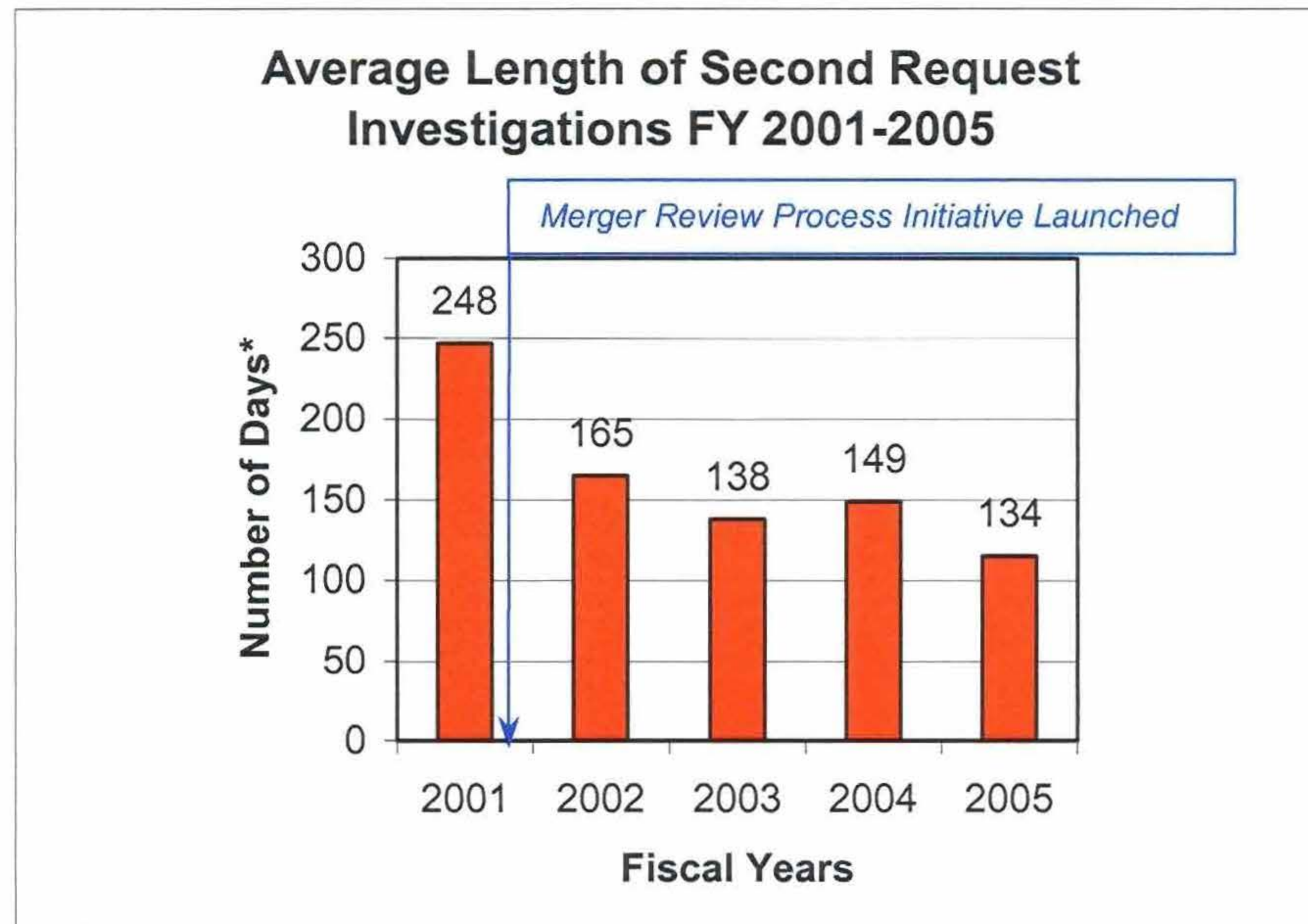


Early decisions on mergers that the Division determines are not likely to harm competition spare the merging parties the expense and delay of a second request investigation, and enable the Division to allocate resources to matters of greater competitive concern.

The Initiative's call for negotiated timing agreements and increased transparency has had a significant impact on the Division's practice. Almost every matter with sufficiently difficult competitive questions as to merit a meeting between the parties and the Division's Front Office now has a scheduling agreement in place that provides greater certainty for the parties and the Division regarding how the investigation will proceed, and when it will end. Also, improved dialogue between staff and the parties has enabled both to focus investigations more effectively on the critical issues, before the transaction reaches the Front Office for final consideration.

In an increasing number of matters, the Division has been able to focus its investigations on discrete dispositive issues. The result has been a marked improvement in how quickly the Division is able to close investigations into transactions that prove not to be anticompetitive. Since the initiative was announced, the number of days that pass from the opening of a preliminary investigation to the early termination or closing of the

investigation, on average (including investigations that did not result in the issuance of second requests), has fallen from about 93 days to 57 days. During the same period, the average duration of second request investigations dropped from about 248 days to 134 days for those matters in which no case was filed, a 46 percent reduction.



While the Division’s success in addressing the burdens faced by parties during the second request process has been measurable, making further progress will require the cooperation of merging firms and their counsel. The 2001 Initiative has resulted in investigations that are more focused, which in many cases has meant that investigations are shorter and less burdensome for the parties and, not incidentally, for Division staff. The costs of full second request compliance and review, however, have continued to climb. This is largely because cost reductions in electronic storage technology have led to huge increases in the volume of electronic documents created and stored by companies, such as e-mail. Although for the past several years second request schedules have not changed materially and the number of custodians searched by most complying firms has remained fairly constant, the volume of electronic documents stored by and for each document custodian has surged. Searching and reviewing these vast electronic sources of potentially responsive documents and information places a significant and

costly burden on parties. It also places significant burdens on Division staff, which must review enormous quantities of documents submitted in response to second requests.

The Initiative addressed the costs and burdens of compliance by urging Division staff to draft second requests narrowly and to negotiate fast and limited investigations with counsel. Fast track or “quick look” investigations could focus on specific issues and leave full compliance to instances when the Division’s issues had not been resolved, or in the event that a decision was made to challenge the deal. As an alternative to this type of fast track merger review, rather than contemplate a possible two-stage production the government may require only a limited production prior to making its enforcement decision, if it has sufficient procedural safeguards in place to allow it to obtain full discovery in the event of litigation.

Sharply reducing second request productions imposes significant litigation risks on the Division. Defendants in merger cases typically desire quick but substantial hearings, merging parties increasingly encourage the antitrust agencies to eschew presumptions and engage in ever-more-sophisticated analyses, and courts frequently expect the Division to present a thorough and detailed empirical analysis of a challenged merger’s likely anticompetitive effects. These trends make it necessary for the Division to collect, review, and digest more information, not less, and to do so as quickly as possible.

The Merger Review Process Initiative encouraged parties to ensure that the Division would have an opportunity to conduct appropriate post-complaint discovery, in return for the Division narrowing its second requests where appropriate to the issues most likely to be determinative to the enforcement decision. The Division recognizes that merging parties and their counsel ideally want to preserve as many options as possible, including the option of asking the judge for an expedited trial in the event of a challenge. In most transactions, however, firms will likely find it to their advantage not to comply fully with a second request, but rather to enter into a process and timing agreement that enables the Division to defer significant production to the post-complaint discovery period, because very few merger investigations result in litigation. In fiscal years 1999-2005 the Division issued second requests in 248 merger investigations, but only 55 of



those investigations resulted in the filing of a complaint, and only four of those complaints led to a trial. With so few cases actually subject to contested litigation, the Division believes that in the large majority of mergers parties can significantly reduce the burdens of merger review by agreeing to defer significant discovery until after a challenge is brought. The amendments to the Merger Review Process Initiative that the Division is announcing today are designed to make this option part of the Division's standard merger review practice.

### **MRPI Amendments**

The Division uses the information it collects during the second request process both to evaluate the transaction and to prepare a possible case should the investigation result in a challenge. However, with sufficient cooperation from the parties the Division is often able to make informed enforcement decisions by reviewing less evidence than might be necessary to prepare for and bring a merger challenge in court. Recognizing that only very few second request investigations lead to contested litigation, the Division believes that it can defer the production of significant volumes of documents and information in most investigations, in exchange for process and timing agreements that preserve its ability to conduct post-complaint discovery when necessary.

As explained more fully in the revised "Merger Review Process Initiative," available on the Antitrust Division's website, effective immediately recipients of Division second requests that wish to reduce significantly the scope of their productions may enter into a merger review "Process & Timing Agreement" with Division staff. Parties that pursue this option shall generally be required to search no more than 30 individuals per party for hard copy and electronic documents that are responsive to the second request. The option will be conditioned on certain timing and procedural agreements that, among other things, protect the Division's ability to obtain appropriate and necessary discovery in the event of a litigated challenge to the transaction.

The Process & Timing Agreement option will be made available to most second request recipients. Division staff may refrain from offering this option in certain cases, such as those that involve many product or geographic markets or that raise particularly

complex issues, but only with the approval of the Deputy Assistant Attorney General responsible for the investigation.

*“Process & Timing Agreement” Option Requirements*

To qualify for the merger review Process & Timing Agreement option, the parties must provide certain information to Division staff early in the investigation so that staff can negotiate limitations to the second request and identify the employees whose files must be searched. As described in detail in the amended Merger Review Process Initiative, to take advantage of this option each party must:

- provide information that Division staff requested it to provide voluntarily during the initial HSR waiting period;
- provide Division staff with one copy of each current organization chart and personnel directory or similar document for the company as a whole and for each of the company’s facilities or divisions involved in any activity relating to any relevant product or service, as required by the second request;
- make available to Division staff on an ongoing basis employees or agents who are able to explain the organizational structure of the company, including the job responsibilities of the individuals identified in the company’s organization charts;
- make available to Division staff on an ongoing basis employees or agents knowledgeable about the company’s electronic data systems and policies or practices regarding retention, storage, deletion, and archiving of electronic data, including e-mail, as required by the second request; and
- make available to the staff on an ongoing basis employees or agents knowledgeable about data used and maintained by the company that may contain information responsive to the second request.

The Division encourages parties to make appropriate employees available to the staff, particularly for purposes of explaining the organizational structure of the company. It has been the Division’s experience that outside counsel usually do not possess sufficient knowledge about the company’s structure and employees to be able to discuss the organization in sufficient detail.

Parties wishing to take advantage of this option also must enter into a Process & Timing Agreement with the Division. Such an agreement may contain the full range of timing and production commitments described in the amended Merger Review Process Initiative. The Agreement also will include provisions to ensure that the Division has sufficient time to conduct post-complaint discovery if it decides to challenge the transaction in district court. It has been the Division's experience that a period of four to six months is generally necessary to conduct post-complaint discovery, even in cases preceded by full HSR compliance.

As explained in the Merger Review Process Initiative, Section Chiefs and the Deputy Assistant Attorneys General will have considerable discretion as to how a Process & Timing Agreement should be structured based on the specific facts and issues involved in the case. Factors to be considered when fashioning an Agreement will include the complexity of the transaction; the Division's expertise in the markets and issues under consideration; the nature and magnitude of the competitive concerns at issue; and the volume, types and availability of information required to make appropriate law enforcement decisions. For purposes of illustration the Division is releasing a Model Process & Timing Agreement with today's Amendments to the Merger Review Process Initiative. The Model can be found on the Antitrust Division's website.

#### *Custodian Search List*

Second request recipients that satisfy the requirements of the Process & Timing Agreement option shall generally be required to search the files of no more than 30 individuals for hard copy and electronic documents that are potentially responsive to the second request.

As explained in the amended Merger Review Process Initiative, the custodian search list limitation will not apply to the hard-copy and electronic files of any predecessors or successors of the 30 individuals identified by the Division, nor to the files of the secretaries or other administrative assistants who support the individuals identified on the search list. The limitation also will not apply to any hard copy or electronic central files, databases, data sets, or other central or shared repositories of potentially responsive information (*e.g.*, business plans, budgets, sales reports, bid files, patent files).

However, parties may negotiate additional limitations with the staff to cover such sources of documents and/or data.

The search list may exceed 30 individuals, but only with the express authorization of the relevant Section Chief responsible for the investigation. For example, if the second request covers many different relevant products, services, or geographic markets, or if the transaction raises multiple complex issues, the Division may require each party to search more than 30 individuals for potentially responsive documents. The Section Chief will inform the parties if the Chief determines that searching 30 individuals will not be sufficient, and the parties will be given an opportunity to discuss the matter with the responsible Deputy Assistant Attorney General.

Issues typically evolve over the course of a merger investigation, and often the files of employees who neither the Division nor the parties recognized as being sources of important information when the second request was issued become critical to the evaluation of the merger. So that Division staff will be able to analyze such information as part of its review, under the Process & Timing Agreement option staff will be permitted to add up to a total of five custodians to each party's search list over the course of the merger investigation, subject to the review and approval of the responsible Section Chief. Similarly, should either party produce or rely upon information from an individual who is not on the search list, it will be required to conduct a thorough search of that person's files and produce any responsive documents and information found to the Division. To avoid unnecessary delay, the addition of custodians after the search list has been finalized need not postpone a party's certification of compliance with the second request, provided that the parties agree in the Process & Timing agreement to submit responsive documents within 15 business days of the party's receipt from the Division of the names of the additional custodians. If this schedule is not met, all remaining agreed-upon post-certification dates in the Process & Timing Agreement will be moved back, day-for-day, until all requested materials have been submitted.

The Process & Timing Agreement option will not limit the ability of companies to negotiate additional or different second request modifications with Division staff or to

take advantage of the Division's Second Request Internal Appeals Procedure, which will continue to be available to all second request recipients.

### **Revisions to the Model Second Request**

Division staff crafts each second request to enable it to investigate the unique issues raised by the transaction that is under review. For example, a second request issued by the Telecommunications and Media Section in an investigation of a merger between two wireless telecommunications service providers will contain specifications that will not be found in a defense industry second request issued by the Litigation II Section, and vice versa. However, all Division second requests are based on the Model Second Request maintained by the Division's Office of Operations. This Model provides Division staff in all sections with pre-approved language for commonly used specifications, definitions, and instructions. The Division continually revises the Model Second Request to clarify definitions, reduce search and production burdens, and ensure that the model specifications are narrowly drafted and consistent with the Division's current practice.

In addition to the amendments to the Merger Review Process Initiative, to reduce production burdens further the Division is releasing today a revised Model Second Request. The revisions are based largely on limitations that Division staff has successfully negotiated and implemented in merger investigations in recent years. This new Model will be the basis for all second requests issued by the Division, regardless of whether parties take advantage of the Merger Review Process Initiative's "Process & Timing Agreement" option.

The more significant modifications include the following:

- Relevant time period: Definition/Instruction M, which identifies the years for which documents and information are to be provided, has required companies to produce responsive documents created or received by the company on or after January 1 of the year that is three years prior to the date that the request is issued. This definition/instruction has been modified to require the submission of responsive documents created or received by the company within two years of the

date of the issuance of the second request, except where otherwise specified. In general, specifications that call for the submission of data will be subject to a relevant time period of three calendar years, unless otherwise specified.

- “Second sweep”: Definition/Instruction N, which describes the “second sweep” that companies are required to conduct in order to observe the continuing nature of the second request, has been modified. Except for standard Specification 16 (transaction and efficiencies documents) companies will generally not be required to conduct a “second sweep” unless they comply with the second request more than 90 calendar days after issuance. The second sweep required for Specification 16 will be limited to documents produced or obtained by the company up to 30 calendar days prior to the date of the company’s compliance with the second request, rather than the current 14 days, or 45 days in the case of any such documents that must be translated into English. If the company’s compliance with the second request is completed more than 90 calendar days after issuance, the Instruction will provide that the entire second request will be deemed continuing in nature. In such cases, the second request will require production of all responsive documents produced or obtained by the company up to 30 calendar days prior to the date of the company’s full compliance, or 45 days in the case of any documents that must be translated into English.
- Back-up Tapes: Back-up tapes and other media that are not reasonably accessible are “documents” that are responsive to a second request. Definition/Instruction O has been modified, however, to permit companies to elect to identify and preserve for the duration of the Division’s investigation a select subset of back-up tapes, subject to the approval of the Division, in lieu of searching all such back-up storage media.
- Production of Electronic Documents: Definition/Instruction O has also been modified to eliminate the requirement that companies produce electronic documents in both hard copy and electronic form. The revised Model Second Request requires that such documents be produced in electronic form only, unless otherwise requested by the Division.

- Privilege Logs: Definition/Instruction R, which describes the “privilege log” that parties are required to submit if they withhold any responsive documents from the production based on a claim of privilege, has been modified to permit companies to omit certain documents from their log that were sent only between the company and its counsel.

*December 14, 2006*