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BREAKING THE CODE - SUCCESSFULLY RESPONDING TO TODAY'S SECOND REQUESTS



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“We must ensure that the merger guidelines reflect current economic realities ... and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive.” —*Joint statement by FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers, July 9, 2021.*

It's no secret we have entered an era of increased antitrust enforcement, where any perceived threat to fair markets and competition will be subject to serious scrutiny from the FTC and DOJ. The billion-dollar risk is whether this increased regulatory scrutiny will thwart completion of big M&A deals, while at the same time potentially destroying equity value, market capitalization and goodwill of the participants all in a single blow. Clearly, the rules of the game are changing and we

need to be able to break the new code for successful M&A deal completion.

Further, President Joe Biden's July 2021 nomination of **Jonathan Kanter** to lead the DOJ's antitrust division is yet another sign of government intent to battle corporate America to ensure more competition in the tech industry and across U.S. markets as a whole. Taken together, these indicators demonstrate a heavy-handed approach.

This article lays out an approach to break the code for successful Second Request response to significantly reduce corporate risk, increase the likelihood for approval to complete large M&A deals and identify the critical resources needed.

The Hart-Scott-Rodino (HSR) Act of 1976 established the federal premerger notification program, known as an HSR Filing, which provides the FTC and the DOJ with information about large mergers and acquisitions



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prior to their occurrence. Should the FTC or the DOJ decide that further examination is warranted, either may seek additional information or documentary materials by issuing a “Second Request” to the parties. Simply put, Second Requests are currently being issued both with more frequency and heightened DOJ scrutiny. Moreover, regulators are becoming more willing to deny certain types of transactions (e.g., tech, as noted above), raising the bar for approval to complete deals in our current market.

In merger investigations, the FTC relies on Section 7A of the Clayton Act, 15 U.S.C. Sec. 18a, which was added by the HSR Act. Whether a particular acquisition is subject to Section 7A requirements depends on a number of factors including the value of the acquisition and the size of the parties as measured by their sales and assets. Premerger notification provisions of the Clayton Act are a powerful incentive for companies to submit information that the government needs to evaluate acquisitions.

Solving the Enigma

In World War II, prior to the German Enigma machine code being cracked by Alan Turing and his new computing machine, codes could only be cracked through thousands of hours of manual calculations. This manual approach is not unlike how Second Requests have been historically handled: voluminous information collected from multiple custodians and data sources and reviewed in a linear fashion under expedited timelines.

The likelihood for approval of Second Request responses is ultimately reliant upon the subjective judgment calls of individuals attempting to ensure accurate decisions are made. Given the vast volumes of data at issue, this has become a recipe for human error and inadvertent production of non-relevant and privileged documents.

In a [prior](#) article, I discussed sample-based learning found within technology assisted review (TAR 1.0). TAR 1.0 uses samples or “seed sets” to train

the algorithm to apply coding to the larger review universe. Statistical analysis is then run on the entire review set to confirm the accuracy of the algorithm. If the desired accuracy isn’t met, you then must train the system again, in an iterative fashion, until you meet your accuracy level.

This approach is not ideal and can be fatal in a Second Request scenario, where the time-compressed period for production is not flexible. It could also back you into a corner requiring mobilization of an army of attorney reviewers, which you may not be able to assemble in the current market under time compressed circumstances. What now?

Robots to the Rescue

Two key areas of AI advancement have arrived to save the day by enabling thorough review and analysis prior to making a Second Request response:

- AI’s ability to identify responsive data to specific questions in massive sets of discovery data, and modeling for predicting outcomes on the same. For these purposes, existing proprietary AI is fully capable of analyzing voluminous data and ranking it for relevance probability responsive to defined issues within a given data set. From there, we can then rank the probability of what likely outcomes may ensue on each based upon historical precedent weighted with current nuances.
- The addition of advanced data science approaches

(e.g., topic modeling) most suited to the subject matter and type of information sought. Essentially, this advancement applies the best data science method available to crunch and deliver results for the type of data with which we are dealing. Think pairing the right wine with the right food for some. The point is the ingredients will be best suited to the preparation methodology.

To achieve statistical defensible results and ensure quality control, the AI output is assessed by subject matter experts and then re-inputted into the AI in an iterative fashion to reduce false positives and enable the machine to learn for achievement of the highest possible level of accuracy. What used to be a hot air balloon is now SpaceX with muscle memory.

TAR 2.0, Continuous Active Learning (CAL), is another arrow in the quiver. The “continuous” aspect of CAL refers to the ongoing process of ranking and re-ranking documents for manual review based on a constant stream of incoming coding throughout the review’s lifecycle. In other words, CAL takes into account not only an initial set of training assessments to rank and prioritize documents, but continuously updates those rankings based on the most recent assessments. This removes any need to go back to the well, recalibrate document seed sets and recalibrate results until a target level of accuracy is achieved.

Critically, the use of such techniques has been successfully negotiated with the DOJ, FTC and other enforcement regulatory entities, demonstrating accuracy and reliability to rank document relevance, priority batching and the exclusion of nonrelevant documents. This has measurably contributed to increasing accuracy while decreasing resource needs. Go robots!

Time Is of the Essence

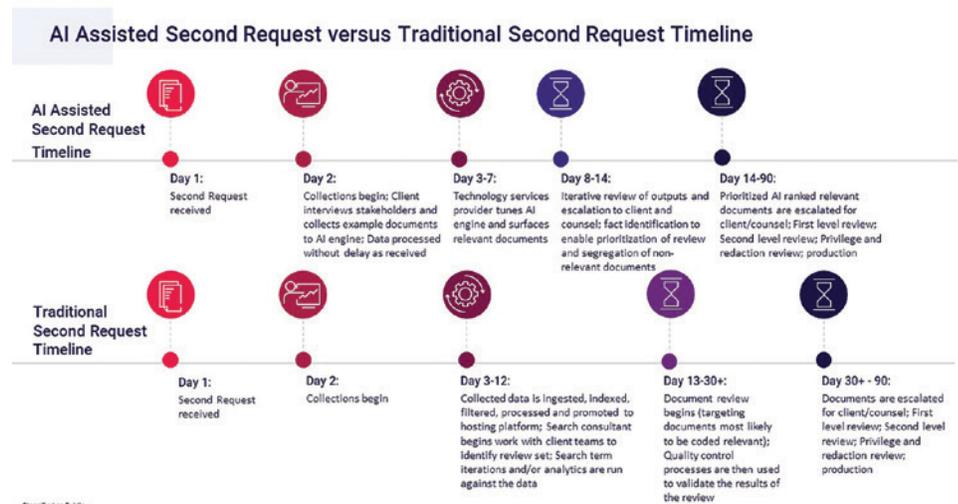
Below follows a timeline comparing an AI assisted Second Request response with a traditional approach:

Using the same hypothetical data assumptions, the AI assisted Second Request response process *enables prioritized review to begin over two weeks earlier than the traditional timeline* (even with the traditional approach using analytics prior to hosting and review).

What would your time/money and resource value equal from saving more than two weeks in response preparation? Would this move the needle to better prepare the response to achieve a greater likelihood of DOJ approval? The magic eight ball points to “very likely.”

At minimum, a greater speed to actionable legal intelligence on a Second Request will enable you to understand your data, fortify against risks and best position your response. Anyone who ever told you “time is money” wasn’t lying when it comes to Second Requests.

Let’s not forget about essential housekeeping. Key to effectively



Courtesy graphic

using legal intelligence at an earlier juncture is a focus upon analyzing potential gaps in quality control (QC). Without these error checks, all could be for naught. Are you producing more than what has been requested? Are there production elements which could create exposure beyond the initial request? Are there any smoking guns which could require further responses and/or defensive postures? These are important questions to answer before you press the send button.

It would be a mistake to underestimate the value of partnering with a reputable global document review provider experienced in Second Requests. Despite the best legal guidance from the top firms in the world, your response requires the deepest possible bench of reviewers and review management who seamlessly integrate with the technology provider and their specialized processes, core competency in your area and subject matter expertise to best position

your Second Request response for approval.

Next Steps

Even in the current environment of heightened antitrust scrutiny and enforcement, we now possess new tools that can break the code for effective Second Request response. In conjunction with a cohesive Second Request response plan, it is essential to assemble the right teams, processes, and technology to get big M&A deals approved and move on to the business of successful integration.

Dan Panitz, Veralocity President & CEO, *is an experienced attorney based in New York with more than 25 years of combined legal, technology and corporate advisory experience. Having worked with SEC Enforcement and NASD (now FINRA) Arbitration, Panitz also holds Anti-Bribery & Corruption specialty certifications for the PRC, UK and the United States.*