

FORM FOLLOWS FUNCTION: NEGOTIATING THE SECOND REQUEST PROCESS WITH GOVERNMENT REGULATORS

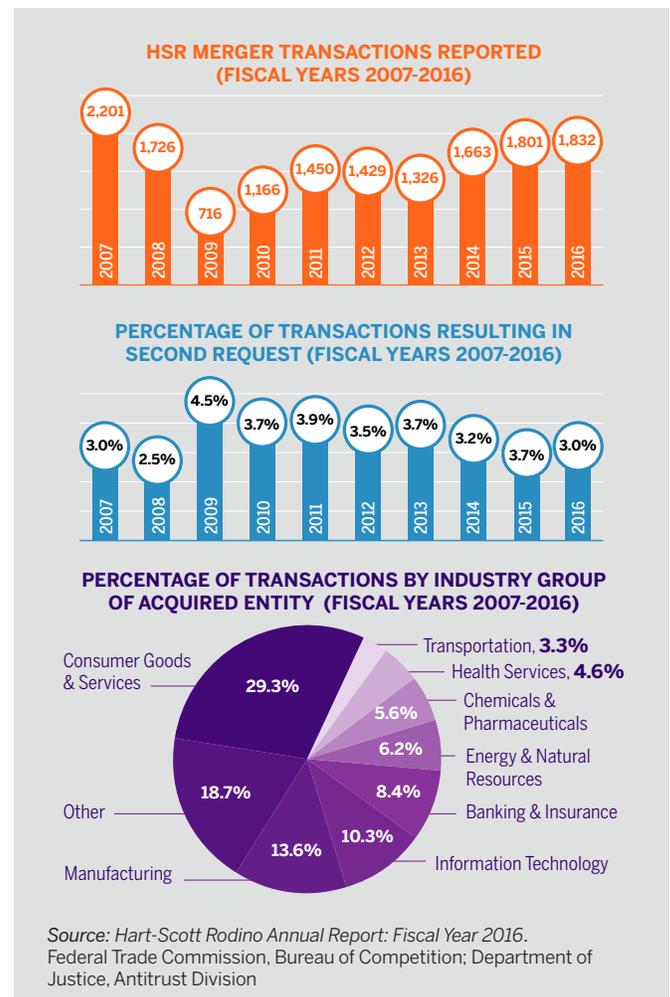
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Introduction

There may be no process in the entire legal business fraught with more urgency than an HSR Second Request. Legal teams are expected to process, review and produce a large quantity of documents in only a few months. Failure to properly comply can result in significant delays. Because of this, there is an enormous temptation to begin the review the moment a Second Request is announced.

This temptation, however, must be resisted until some key “gating factors” are negotiated with the government. Otherwise, legal teams may go down a wrong path with the Second Request review and end up wasting money. These gating factors control what needs to be reviewed, how and when, all of which must be agreed upon before review—either electronic or eyes-on—can begin in earnest.

Having managed the e-discovery process for dozens of Second Requests in the past several years, our team has developed a playbook for the best strategies, technology and workflow to cost-effectively manage a Second Request. This paper outlines one part of the playbook, how to negotiate with the government at the outset on timing agreements, custodian scope, Technology Assisted Review (TAR) and government oversight and reporting. In our experience, the seeds of success are often planted during the government negotiations at the outset of a Second Request.



TIMING AGREEMENTS

First, a quick refresher on the process. Two companies announce a merger or an acquisition, and the Federal Trade Commission (FTC) and/or the Department of Justice (DOJ) have 30 days to conduct an initial review of the deal. These agencies want to ensure that this proposed action will not cause harm to consumers. If after the initial review the agencies need more information before making a ruling, either agency may issue a “Second Request” for more data. For the companies involved, the goal of the Second Request is to certify compliance with the request, which then triggers a 30-day period in which the government must “complete its review of the transaction and take action if necessary.”¹

The above outlines the fixed and codified process, but what’s negotiable? The actual date for compliance is usually negotiated between the government and companies, as are the conditions for compliance. So, upon receiving the Second Request, the legal teams from both companies will need to quickly figure out what the government will want to review, assess how long it will take for the companies to collect, review and produce the relevant materials and privilege log to the agency, and then try to negotiate a deadline that works within those constraints.

It’s important to understand the underlying tension point at the heart of negotiating the compliance certification deadline and productions. Usually, the government wants as much time as possible to review the data – emails, spreadsheets, voicemail recordings, chats, etc. – and determine whether proposed merger will create an unfair market advantage for the new entity. Thirty days is often not enough time to fully review the materials, so the last thing that the government wants is to receive all documents on the same day, right before the negotiated certification compliance deadline.

On the other side, the merging companies typically want to complete the e-discovery process and certify compliance as quickly as possible. After all, board members, executives, stockholders and employees are all in limbo during a Second Request, waiting for the process to finish to fully gauge how the merger will impact them.

Given these various concerns, legal teams should do a few key things before meeting with the agency staff to discuss the timing agreement. First, as much as possible, scope out the likely custodians and the amount of data that will need to be collected. Consider whether the data resides outside of the United States and may be subject to data privacy laws or contain other languages, requiring extra steps and time for defensibly transferring to the US. Assess whether relevant data resides in a unique or



DO:

Begin scoping your likely tier one custodian list and collecting data.



DON'T:

Assume that all data will have the same production deadlines.

new digital format, such as a cloud-based collaboration application. And, as much as possible, tier the custodians so that the team has a clear understanding of the priority materials. For example, high priority custodians may include c-suite executives and those directly involved in the merger.

Once the data universe is defined, the legal team needs to assess realistic timeframes for the e-discovery process given the budget and staffing levels for legal review attorneys. If the legal team knows that executive leadership wants to reach compliance and close the deal within a certain timeframe, they may have to do some internal negotiations to ensure that they have the right team in place to hit those deadlines. Assuming the legal team has followed these steps, they should walk into negotiations with a good sense of the amount of data at hand, the various tiers of data that may be responsive, and realistic timeframes for them to produce this data to the government.

Even with a perfect plan, there are often unanticipated complications, such as later finding that a custodian did not fill their role for the entire time and additional predecessor data exists, or an unusually large or complicated privilege log. Fortunately, an experienced Second Request team knows how to build in time and processes into the negotiations to accommodate these challenges. For example, it is typical to agree on a few priority levels for custodians and assign different data production deadlines for each tier. Offering to produce high priority materials a certain number of days before the compliance date may earn the companies extra time to produce lower priority data. In some cases, it may even be possible to produce some data (such as the final log and a “de minimis” number of re-injects from that log) after the

certification deadline although what constitutes “de minimis” should be quantified to avoid challenge or ambiguity.

Once the compliance date is set and the negotiations are completed, the e-discovery team can then develop the corresponding plan and finalize staffing levels for the project.

SCOPE NEGOTIATION

Along with the timing agreement, it is important to simultaneously agree upon which documents must be produced from which custodians, during which time period. The first consideration is the date range.

If possible, negotiate to have all the specifications addressed in the request to cover the same time period. This simplifies the process and leads to better predictive coding results. When that is not possible, agency staff can sometimes be open to restricting the scope of data in the earlier time period by limiting the number of custodians or with the development of different key words.

Next, agree upon on who the custodians are. Starting the collection and review process (except perhaps for custodians that would have been part of the initial HSR filing) before the list is set can be an enormous mistake. Collecting from employees who end up not making the custodian list can waste a lot of effort and hundreds of thousands of dollars.

At the same time, it is important to account for custodians’ successors and predecessors. It is not likely that all custodians were employed in the same position for the entire date range, so it is important to negotiate what defines a successor and a predecessor in order to account for these positions throughout the collection and review processes.

For some critical custodians, the government will require refresh obligations—basically an updated production for any responsive documents created since the original production. These refreshes can be difficult and complicated, so it is important to reduce the number of custodians subject to the refresh to the extent possible. It is also possible to negotiate the type of documents that are subject to a refresh. Doing so can save a lot of trouble and expense, as collecting emails is much easier than rescheduling time to collect from each custodian’s local devices or coordinating additional scans of paper documents.

It is worth trying to modify the privilege log requirements to make the process much quicker. For example, the government might not require legal teams to log drafts of contracts or regulatory filings. These types

of negotiations may not technically impact the overall compliance certification, but it can substantially limit effort and expense.

TECHNOLOGY ASSISTED REVIEW

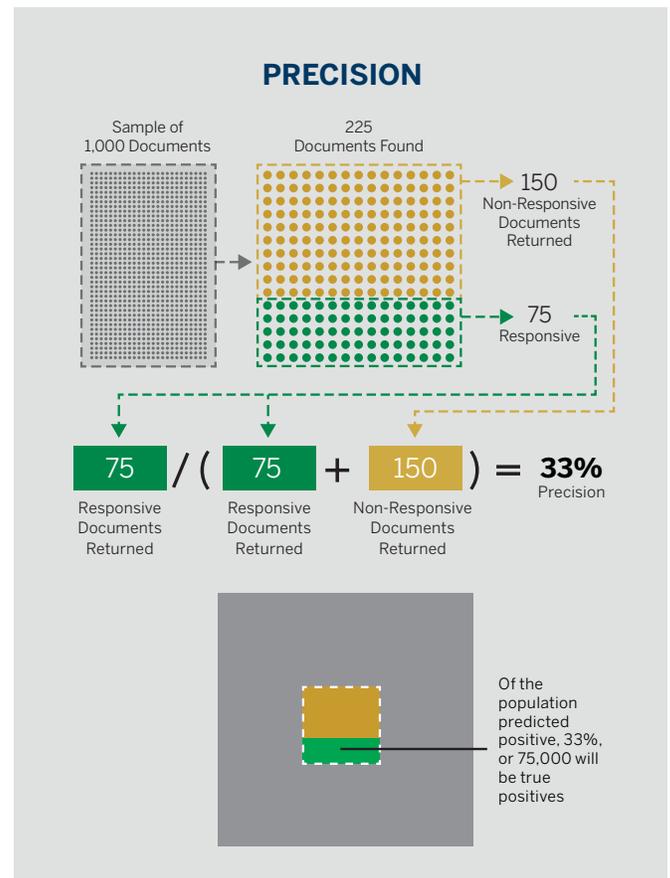
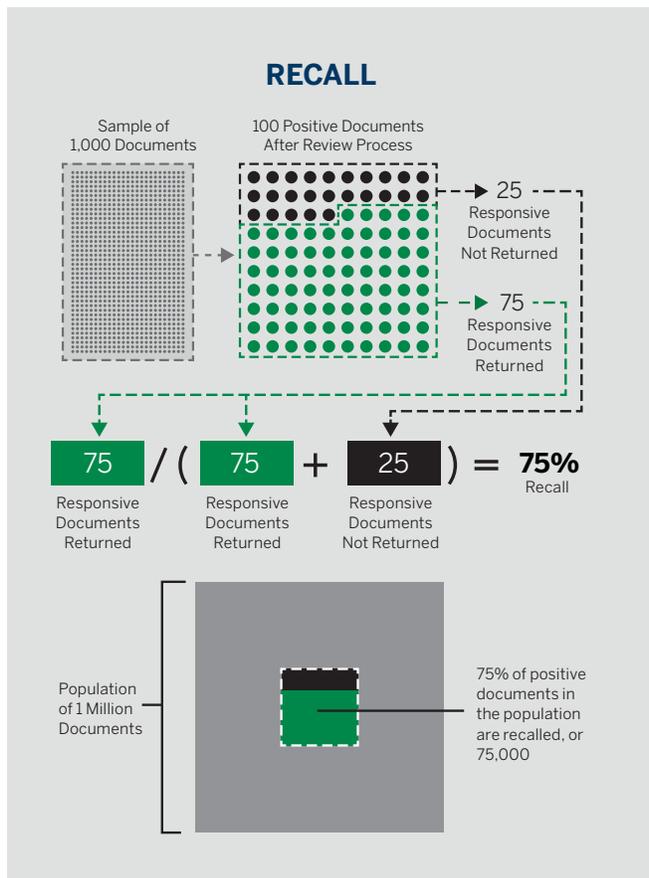
Over the last few years, the agencies have grown more aggressive in its oversight of TAR, and it can be expected that this oversight will continue going forward. Legal teams will need to come into negotiations armed with the full knowledge of how the predictive coding software and statistical reporting works. The TAR agreement should also be settled before the models are set up and model training begins.

TAR is a broad term that can cover everything from keyword culling to predictive coding, but the trend and industry emphasis has lately been on predictive coding. Predictive coding, of course, begins with a seed set to which the rest of the documents will be compared. Over the years, governmental agencies have become extremely sophisticated on the use of predictive coding and have set out guidelines for e-discovery teams. For example, the DOJ’s guideline is to have law firm associates — not contract attorneys — code that seed set. As Tracy Greer, Senior Litigation Counsel for E-Discovery in the DOJ’s Antitrust Division wrote, “The Division believes that the use of subject-matter experts to conduct the review is superior to using armies of less informed lawyers. Productions to the Division too often are rife with facially nonresponsive documents and information that is costly to load and review.”²

Some of the government’s TAR guidelines are negotiable. One guideline that e-discovery teams may want to push back on in negotiations is whether they can predict on documents as they are collected. The government sometimes takes the position that coding predictions are not accurate enough if the collection is not complete, and that if more documents are added an entirely new model must be built for the entire document set. However, with the right safeguards and accurate statistical analysis it may be possible to convince the agency staff during negotiations to allow for multiple predictions using the same model but different validation sets. It is important to understand how this process works and to make sure your e-discovery team can code in tranches. Otherwise, you’ll be forced to create a model from scratch with every new collection.

It is also important to note that the government will try to dictate precision and recall rates. Precision represents the percentage of retrieved documents that are relevant, and recall represents the percentage of

² Technology-Assisted Review and Other Discovery Initiatives at the Antitrust Division, by Tracy Greer. <https://www.justice.gov/sites/default/files/atr/legacy/2014/03/27/304722.pdf>



relevant documents that are retrieved. This is typically a straightforward negotiation because both numbers are simple percentages. Generally, the government wants a higher recall number because that represents the number of documents they will receive, and clients will want a high precision number because that saves budget.

Understanding the government’s guidelines in advance of the negotiations can help legal teams better prepare and push against TAR processes that may be overly burdensome or expensive.

GOVERNMENT OVERSIGHT AND REPORTING

One of the biggest changes in the Second Request process is the frequency and detail of reports now required by the DOJ. Historically, it only required reporting at the end of the process, but today there is a push for daily reports. (It’s important to note that while Second Request discovery service providers like FTI Consulting can accommodate this, there is an industry discussion underway to determine the right balance between

what is considered work product and what is good faith cooperation of the process.) The government also typically requires a sampling of documents that have been predicted to be non-responsive, and they will require some level of remediation should they feel that too many responsive documents have been missed. The common arrangement is for agency attorneys to do this at the counsel’s office, never taking control of actual documents. The government may also ask to receive the actual predictive scores related to each document, but clients can usually push back on this under the attorney work product doctrine.

One final and critical point: the government most likely will not allow documents that have been classified as responsive by the model to be changed to non-responsive as they make their way through the privilege review process. They argue that this nullifies the recall rate agreed upon during negotiations.

CONCLUSION

The high-stakes Second Request process is growing more complex due to growing data volumes and diversity, TAR technology usage and new guidelines put forth by the Department of Justice. Second Request experience combined with a clear playbook for the process can have a profound impact on the success of the government negotiations. The negotiated timeline, custodian scope, technology use and reporting framework negotiated with the government will determine the necessary staffing levels for the project, as well as the speed at which the e-discovery team can conduct the process and meet the certification compliance. Beginning the e-discovery process before negotiating with the government can lead the legal team to run afoul of DOJ guidelines, resulting in delayed compliance and unnecessary expense.

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