

eDiscovery Advancements Meet the Unique Challenges of Second Requests



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Looking Forward

Current signs indicate high numbers of Hart-Scott-Rodino (HSR) Second Requests now and into the future. At the same time, leaps in technology are generating increasingly complex datasets and powering new eDiscovery tools. By understanding the HSR and technology landscape, legal teams can better prepare for mergers and acquisitions under scrutiny and protect their clients throughout the process.

Second Requests: A Mainstay in a Complex Landscape

Federal regulators have set a clear intention to increase scrutiny of M&A activities. Numerous statements by officials at the Federal Trade Commission (FTC) and Department of Justice (DOJ) underline this intention. These statements are backed by President Biden's [2021 Executive Order on Promoting Competition in the American Economy](#), which outlines a “whole of government” effort to promote competition.

Although that effort is not without obstacles, it's worth taking seriously. [HSR filings hit a 10-year high in 2021](#), and officials have complained about the difficulty of keeping up. However, they're also adapting by using advanced eDiscovery tools to investigate documents with more precision and efficiency. Skepticism toward large corporations and deals is by no means limited to the current administration; it was shared by the prior administration and has numerous champions on both sides of the aisle. So, we can expect Second Requests to play a consistent part in M&A activity going forward. They are regulators' primary instrument to scrutinize deals and scrutiny appears to be here to stay.

Next-Generation Tools Rise to the Challenge

For corporations and law firms approaching M&As, the pressure is on to be prepared. Data volume and complexity have soared in the last decade, driven most recently by the mass migration of data to the Cloud and other outcomes of the seismic shift to remote work. During a Second Request, the data requirements are as demanding as they come: Parties need to review millions of documents as carefully and quickly as possible.

Fortunately, new tools enable legal teams to review and search data with the accuracy, reliability, and flexibility necessary to meet the extraordinary demands of a Second Request. These include advanced AI review tools and highly nuanced search tools for identifying key documents.

Increasing precision and efficiency with advanced AI

Review tools using advanced AI are built for modern data. With capabilities like natural language processing (NLP) and deep learning, advanced AI tools go beyond the machine learning utilized by traditional TAR tools to offer more accuracy, efficiency, and flexibility.

For Second Requests specifically, advanced AI provides a number of advantages, including:



Getting started on the matter right away



Conducting concurrent classifications



Gaining more precise review

AI ADVANTAGES FOR SECOND REQUESTS



Case teams can start right away

Advanced AI allows case teams to start analysis and review as soon as the technology and workflow are approved by the DOJ or FTC. With legacy technology, teams don't have that luxury. They must wait until they're done negotiating with regulators about the relevant custodians and timeframe—or else risk starting the whole process over if negotiations trigger any changes to the dataset. Advanced AI, on the other hand, can adapt to those changes. You can add or remove documents without rebuilding the original training model and classification index.



Teams can conduct responsive and privilege classification at the same time

Reviewing for privilege is so resource intensive that, with traditional TAR, it isn't practical to do it across the whole dataset. First, teams have to review for responsiveness. Then they can do privilege review, looking only at the set of responsive documents. But since advanced AI systems are built for big data, they don't need to work sequentially. Teams can run both reviews concurrently—saving invaluable time during the mad dash toward substantial compliance.

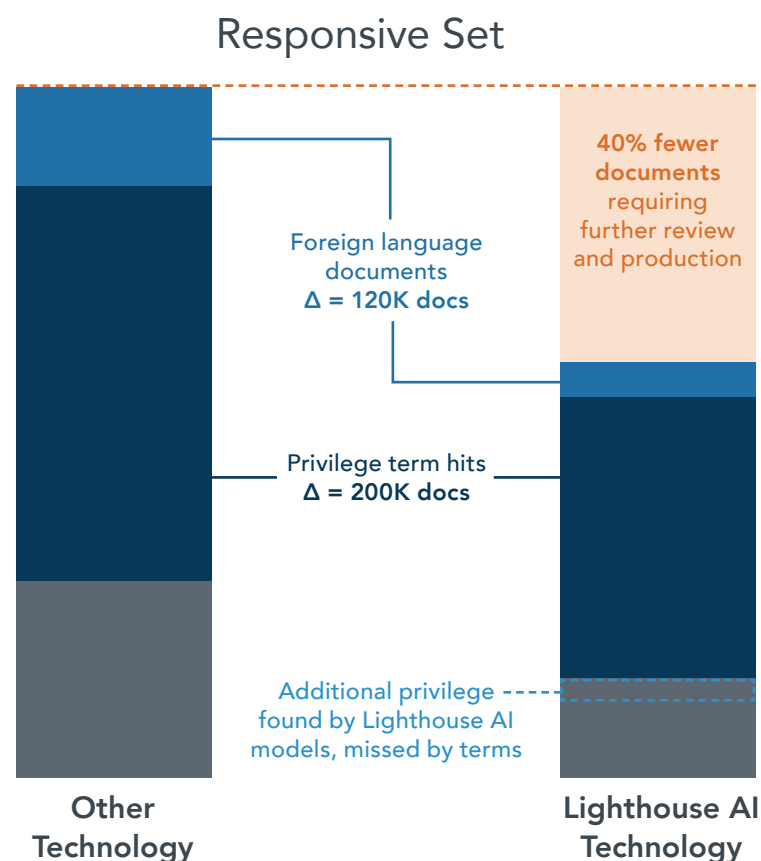
AI ADVANTAGES FOR SECOND REQUESTS



Review is more precise, giving regulators only what they need

Capabilities like NLP and deep learning help advanced AI perform more precise review than legacy TAR tools. As a result, case teams can confidently eliminate large swaths of nonresponsive documents from production. This can result in a much smaller responsive set at the end of the process, along with less risk of giving regulators unnecessary documents that can threaten the merger or incite further scrutiny.

During one recent Second Request, advanced AI reduced the responsive set by 40% compared to a legacy tool. This included 200,000 documents that hit on privilege terms that no longer needed to undergo privilege review. Also included were 120,000 foreign language documents that, since they weren't being produced to regulators, no longer required translation. Further, the nuanced review via advanced AI identified additional privileged documents, missed by conventional approaches.



AI ADVANTAGES FOR SECOND REQUESTS | SUMMARY

Although they are new, advanced AI tools are proving viable for HSR Second Requests. We have seen the government accept one such tool during Second Request negotiations in the last year. We expect this to become more common as legal teams grow more aware of the power of these tools and propose using them in their workflows.

Identifying key documents to enhance preparation

Another group of tools suited for the demands of Second Requests are those that identify key documents within a large dataset. These tools conduct superpowered searches of both text and non-text, using complex and dynamic search strings managed by linguistic experts.

Designed for case building, these tools also provide many benefits during and leading up to Second Requests:



See what you are producing



Search key documents with flexibility



Better prepare initial filings

CASE BUILDING TOOLS



Counsel can see what they're producing to regulators

At best, most legal teams have a vague and incomplete idea of what is actually in the troves of documents they produce to regulators. The volume is just too large to grasp it all. Tools that identify key documents lift the fog and give teams a vivid snapshot, surfacing the few hundred or thousand documents that matter most according to the specific search criteria set by the team.



Key document search can happen during or before responsive review

The same dataset can be reviewed for responsiveness and searched for key documents at the same time. This was the approach during one recent Second Request, where 1,000 key documents out of a total 19M were identified over the course of three weeks. Counsel received the documents in eight rolling deliveries, the first one coming just three days after kick-off. This saved counsel at least a month's worth of preparation time for witness interviews and defense planning.

To save even more time, teams can start the process before a Second Request is issued. Searching for key documents is iterative by design, guided by a dedicated team of experts who respond to ongoing cues from counsel. This team is already adjusting their focus and delivering documents as they go, so adjusting to new custodians and other changes dictated by regulators is no problem.

CASE BUILDING TOOLS



Teams can better prepare initial HSR filings

Even before a Second Request is issued, identifying key documents can play a significant role. In support of an initial HSR filing, it can help identify 4(c) and 4(d) documents that are required as part of the disclosure. It can also identify the best instance or latest version of important documents. This is especially helpful in situations where executives or others involved in the deal have massive data populations and don't know where the relevant documents are.

A new standard for protecting sensitive information?

Regulators used to be somewhat forgiving when it comes to mishandling sensitive information like protected health information (PHI) or personal identifiable information (PII). Identifying those documents out of a set of many millions was so difficult that parties could get away with a few inadvertent disclosures without penalty.

But regulators may soon raise their expectations. More and more states are enacting strict data privacy laws and regulators are learning that advanced AI can pinpoint sensitive data much more effectively than legacy tools. For one recent Second Request, outside counsel and Lighthouse created and validated a PHI model that achieved 90% recall at 90% precision. This was done with very little coding work, by leveraging an out-of-the-box model and training it with coding from past client matters. It's clear that legal teams can easily utilize advanced AI to more efficiently and accurately detect sensitive information, making it the ideal approach for the legal industry and regulators too.

A Chance to Excel—or Fail

Technological advancements are changing how legal teams meet the demands of a Second Request, as well as what regulators expect. Like other evolutionary leaps in discovery that have come before, these advancements create an inflection point for attorneys. Those who don't evolve with technology risk making avoidable errors and missing out on benefits to them, their clients, and the deals they're entrusted with.



About Lighthouse

For 25 years, Lighthouse has provided innovative software and services to manage the increasingly complex landscape of enterprise data for compliance and legal teams. Lighthouse leads by developing proprietary technology that integrates with industry-leading third-party software, automating workflows, and creating an easy-to-use, end-to-end platform. Lighthouse also delivers unique proprietary applications and advisory services that are highly valuable for large, complex matters, and a new SaaS platform designed for in-house teams. Whether reacting to incidents like litigation or governmental investigations, or designing programs to proactively minimize the potential for future incidents, Lighthouse partners with multinational industry leaders, top global law firms, and the world's leading software provider as a channel partner.

Contact us to find out what Lighthouse can do for your business.

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